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WILCOX & CO

No. 5703

United States Circuit Court of Appeals

For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

H. A. LINDQUIST and SELMA A. LINDQUIST,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorneys for Appellant:

BUTLER, VAN DYKE & DESMOND, Esqs.,
EDWARD P. KELLY, Esq.,
Sacramento, Calif.

Attorneys for Appellees:

RALPH H. LEWIS, Esq.,
GEORGE E. McCUTCHEN, Esq.,
Sacramento, Calif.

In the Northern Division of the District Court of the United States, in and for the Northern District of California.

H. A. LINDQUIST and SELMA A. LINDQUIST,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

COMPLAINT.

Plaintiffs complaining allege:

I.

That defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That plaintiffs are citizens and residents of the State of California; that defendant is a resident of the State of Minnesota and the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

That on and prior to the 29th day of September, 1921, plaintiffs were residing in St. Paul, Minnesota, were wholly unfamiliar with California farm and fruit lands, the nature, quality and values thereof and in all negotiations hereinafter referred to were compelled to rely, and did rely, entirely upon the statement and representations of defendant with respect thereto.

IV.

That defendant well knew of the unfamiliarity of plaintiffs with each of the matters and things contained in the representations hereinafter set forth and with intent to cheat [1*] and defraud plaintiffs by inducing them to enter into the contract hereinafter referred to falsely and fraudulently stated and represented to plaintiffs that all of the 10-acre tracts of land in the County of Sacramento, State of California, then being sold by defendant were, and particularly that that certain real property in the County of Sacramento, State of California, described as Lot No. 19 of Vineland, according to the official map or plat thereof, was of the fair and reasonable value of $275.00 per acre; that all

*Page-number appearing at the foot of page of original certified Transcript of Record.

of the land thereof was rich and fertile and was capable of producing all sorts of farm crops and products; that said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that said land was perfectly adapted to the raising of fruits of all kinds in commercial quantities; that said land was capable of producing large crops of any kind of deciduous fruit planted thereon, and that said crops were of the finest quality.

V.

That plaintiffs relied solely upon said representations, and each of them, and believed the same to be true and solely by reason thereof entered into a contract with defendant on or about said 29th day of September, 1921, whereby defendant agreed to sell and plaintiffs agreed to purchase the 10-acre tract of land above described at a price of $3,250.00.

VI.

That plaintiffs well and faithfully did and performed all the terms, covenants and conditions of said contract on their part to be performed and on or about the 30th day of October, 1923, defendant deeded said real property to plaintiffs and plaintiffs paid a balance thereon and in so doing executed a promissory note for $1,150.00 to the F. A. Bean Foundation, Inc., a corporation, and secured the same by a first deed of trust upon said land and further and as the [2] balance of the agreed purchase price of said land executed three notes for a total of $1,000.00 and a deed of trust to defendant

herein. That said three notes were fully paid on and prior to the 25th day of October, 1926.

VII.

That it was not then, there, at any time, or at all true that said land above described, or any of said parcels of land, were, or was, of the value of $275.00 per acre, or that any portion thereof was worth in excess of $15.00 per acre and/or that any of said land was fertile and/or would produce any crops in commercial quantities and/or was at all adapted to the growing of fruits or fruit-trees and/or that trees of any kind would grow, thrive or flourish thereon.

VIII.

That said representations were, and each of them was, at the time of the making thereof false and untrue and were at said times known to defendant to be false and untrue and were made solely for the purpose of cheating plaintiffs out of their money by inducing them to enter into said contract and to make said payments.

IX.

That plaintiff did not discover the falsity of said representations, or any of them, until January, 1928, and prior thereto and because of their reliance thereon plaintiffs expended moneys in the improvement of said described real property and bestowed labor thereon. That in so doing plaintiffs constructed a house thereon at an expense of $1,000.00, installed pumps at an expense of $757.00, built chicken-houses at an expense of $450.00, plowed and levelled said land at an expense of $300.00, put

a lawn about the house on said property at an expense of $100.00, blasted for and planted trees at an expense of $200.00, installed water pipes for irrigation and domestic use at an expense [3] of $300.00, built fences at an expense of $100.00, put in electric wiring at an expense of $50.00 and bestowed work and labor upon said property of the actual and reasonable value of $6,500.00. That each of the said sums was the actual, necessary and reasonable expense of each of said items.

X.

That in making said improvements and attempting to make said place produce, as aforesaid, plaintiffs have so expended in money and work and labor $9,757.00, paid to defendant $3,250.00, plus interest, and plaintiffs have so expended upon said property $13,007.00. That had said property been as represented said moneys would have been property expended thereon and said property would have been worth the said total cost thereof *and said property would have been worth the said total cost thereof buy* by reason of the fraud and deceit of defendant, as aforesaid, and of the falsity of said representations said land as improved is not worth in excess of $1,000.00 and plaintiffs have thereby been damaged in the sum of $12,007.00.

XI.

That said acts of defendant, and each of them, and defendant's whole course of conduct was unlawful, malicious, fraudulent and oppressive and a reasonable sum to be allowed plaintiffs as *punitive therefor* is $5,000.00.

WHEREFORE, plaintiffs pray judgment for $17,007.00, for plaintiffs' costs of suit and for such other and further relief as to the Court shall seem meet and proper.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs. [4]

State of California,
County of Sacramento,—ss.

H. A. Lindquist, being duly sworn on oath, says he is one of the plaintiffs in the above-entitled matter and that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

W. A. LINDQUIST.

Subscribed and sworn to before me this 3d day of February, 1928.

[Seal] GEORGE E. McCUTCHEN,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Feb. 6, 1928. [5]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes defendant above named, and demurs to the complaint of plaintiffs on file herein, and for grounds of demurrer alleges as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this, that it does not appear therefrom what facts were discovered by plaintiffs in January of 1928, or thereafter, from the discovery of which plaintiffs allege that they became informed of the alleged falsity of said representations; nor can it be ascertained therefrom what was the nature or character of the work and/or labor bestowed upon said property as alleged in plaintiffs' complaint; nor can it be ascertained therefrom the quantity of labor so bestowed.

III.

That said complaint is ambiguous and unintelligible for each of the reasons hereinabove given for its being uncertain.

IV.

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof of the Code of Civil Procedure of the State of California. [6]

WHEREFORE, defendant prays that plaintiffs take nothing by their action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 16, 1928. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 12th day of March, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 12, 1928—ORDER OVERRULING DEMURRER.

After hearing the attorneys, IT IS ORDERED that the demurrer to complaint be overruled, with leave to answer within 20 days. [8]

[Title of Court and Cause.]

ANSWER.

Now comes defendant above named, and answering plaintiffs' complaint, admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in Paragraphs I and II of plaintiffs' complaint.

II.

Denies that in the negotiations for the purchase of California lands, as set forth in plaintiffs' complaint, plaintiffs, or either of them, were compelled

to rely, or did rely upon the statements and/or representations of defendant with respect thereto.

Admits that on the 29th of September, 1921, plaintiffs were residing in St. Paul, Minnesota.

Concerning the allegations that plaintiffs were then wholly unfamiliar with California farm and fruit lands, their nature, quality and values, defendant alleges it has not sufficient information or belief to enable it to answer the same, and upon that ground and for that reason it denies, both generally and specifically each and all of said allegations. [9]

III.

Admits that on the 29th day of September, 1921, plaintiffs and defendant entered into a contract, whereby defendant agreed to sell and plaintiffs to purchase the ten-acre tract of land described in Paragraph IV of plaintiffs' complaint.

IV.

Admits that on the 30th day of October, 1923, defendant deeded said real property to plaintiff; denies that at said time plaintiffs paid the balance due upon said contract of purchase; admits that at said time plaintiffs executed a promissory note for Eleven Hundred Fifty ($1150.00) Dollars, to the F. A. Bean Foundation, Inc., a corporation, and secured the same by a first deed of trust upon said land; admits that plaintiffs at said time also executed three notes for a total of One Thousand ($1,000.00) Dollars, to defendant, and secured the same by a second lien deed of trust, and that said three notes have been duly paid.

V.

Concerning the allegations in Paragraph IX of plaintiffs' complaint to the effect that plaintiffs constructed a house on said real property at an expense of $1,000.00; installed pumps at an expense of $757.00; built chicken-houses at an expense of $450.00; plowed and levelled said land at an expense of $300.00; put in a lawn at an expense of $100.00; blasted for and planted trees at an expense of $200.00; installed water pipes for irrigation and domestic use at an expense of $300.00; built fences at an expense of $100.00; put in electric wiring at an expense of $50.00, and bestowed labor thereon at a value of $6,500.00, and that each of said sums was the actual, necessary and reasonable expense of each of said items, defendant alleges it has not sufficient information or belief upon or concerning the same to enable it to answer, and therefore, denies [10] both generally and specifically, each and all of said allegations, but in this connection defendant admits that plaintiffs constructed a house on said property, installed pumps, built chicken-houses, plowed and levelled the land, put in a lawn, blasted for and planted trees, installed water pipes, built fences, and put in electric wiring.

VI.

Defendant admits that in the manner hereinbefore alleged, plaintiffs paid a total of $3,250.00, plus interest, for said property.

VII.

Defendant denies each and all of the allegations

of plaintiffs' complaint not hereinabove denied for want of information or belief, or not hereinabove expressly admitted.

Further answering plaintiffs' complaint, and as a further defense thereto, defendant alleges:

That this action and cause of action is barred under the provisions of Section 338 of the Code of Civil Procedure of the State of California, and of Subdivision 4 thereof.

As a separate and further defense to plaintiffs' complaint, defendant alleges, that if any misrepresentations were made concerning the value, quality or characteristics of the real property purchased by plaintiffs from defendant, that the same were waived for the following reasons, to wit:

That after plaintiffs discovered the quality, characteristics and value of said land, plaintiffs became and were in default under the terms and provisions of said contract of purchase; that said defaults of plaintiffs consisted of the following, that is, that on January 1st, 1923, when, pursuant to the terms of said contract, there was due an annual payment of $530.00, with interest, [11] plaintiffs failed to make the same; that in spite of said default plaintiffs procured from defendant, leave to continue with the performance of said contract, and defendant allowed said contract to remain in force and effect and did not declare a forfeiture thereof; that on November 1st, 1923, while plaintiffs still remained in default as aforesaid, it was agreed between the parties to said contract, that the sum of the indebtedness owing from plaintiffs to defend-

ant should be changed and that the amount of annual payment required should be reduced, and pursuant to said agreement, and at the request of plaintiffs and under the consent of defendant, the sum of the said indebtedness and of the security therefore, was changed as follows:

Plaintiffs executed a promissory note in the sum of $1,150.00, to the F. A. Bean Foundation, Inc., a corporation, and secured the payment of the same by a first lien deed of trust upon said real property, the legal title thereto having been conveyed to plaintiffs by defendant. Said promissory note was by its terms due in five years and bore interest at the rate of seven per cent, payable quarterly. The balance of said indebtedness due defendant was at said time to be handled as follows:

Plaintiffs were to pay the sum of $654.59 in cash at the time the deed was passed, and execute their promissory note for One Thousand Dollars, secured by a second lien deed of trust upon said real property; that plaintiffs did execute said promissory note and deed of trust, but failed to pay said sum of $654.59, and defendant, at the request of plaintiffs, permitted said sum of $654.59 to remain unpaid until November, 1924, at which time plaintiffs paid the sum of $750.00 to apply on account; that during all of said negotiations, after the making of said contract, plaintiffs [12] concealed from defendant the fact that they were claiming to have been, or believed themselves to have been defrauded in the making of said contract.

WHEREFORE, defendant prays that plaintiffs take nothing by their said action herein, and that defendant have and recover of and from plaintiffs its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant. [13]

State of California,
County of Sacramento,—ss.

L. B. Schei, being duly sworn, deposes and says: That he is an officer, to wit, the resident secretary of Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the within entitled action; that he makes this affidavit for and on behalf of said corporation defendant; that he has read the foregoing and annexed answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to such matters he believes it to be true.

L. B. SCHEI.

Subscribed and sworn to before me this 24th day of April, 1928.

[Seal] A. E. WEST,
Notary Public in and for the County of Sacramento, State of California.

Service hereof is hereby admitted and receipt of copy acknowledged this 24th day of April, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Pltf.

[Endorsed]: Filed Apr. 24, 1928. [14]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Tuesday, the 16th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 16, 1928—TRIAL.

This case came on regularly this day for trial. Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiffs and E. P. Kelly and J. W. S. Butler, Esqrs., appearing as attorneys for the defendant. Thereupon the following named persons, viz.:

Jacob Kammerer,	Nochell Cirincion,
Emil A. Hintz,	John D. Greene,
Robert Blume,	Henry Morgan,
C. R. Fairfield,	Gordon Dinney,
Dave Mullen,	A. H. Griesel and
John Jurach,	Milo Dye,

twelve good and lawful jurors, were, after being duly examined upon their oaths, sworn to *tey* the issues joined herein. Counsel for both sides made their opening statements to the Court and jury. H. A. Lindquist, Selma A. Lindquist, John A. Lind-

quist, Howard D. Kerr, Adolph Stern, H. L. Frederickson, and Herbert C. Davis were sworn and testified on behalf of the plaintiffs and the plaintiffs introduced in evidence and filed its exhibits marked Nos. 1, 2, 4 and 5 and the plaintiffs rested. Lambert Hagel, John Posehn, F. E. Unsworth, H. F. Bremer, J. Geddes, Louie Terkelson, H. S. Wanzer, Walton Holmes, E. E. Amblad, Arthur Morley, and F. E. Twining were [15] sworn and testified on behalf of the defendant and the defendant introduced in evidence and filed its exhibits marked Nos. 3, 6, 7, 8, 9, 10 and 11 and the defendant rested. Herbert C. Davis was recalled in rebuttal and James B. Leach, Ida E. Perra and John V. Krall were sworn and testified on behalf of the plaintiff, and the plaintiff again rested. Defendant made and filed a motion for a directed verdict, which motion was ORDERED denied. After argument by the counsel and the instructions of the Court to the jury, the jury at 5:15 o'clock P. M. retired to deliberate upon their verdict. ORDERED that the jury be committed to the custody of the U. S. Marshal until such time as they shall have agreed upon a verdict. The verdict shall be signed by the foreman and sealed in an envelope and kept in the custody of the Foreman, and the jury shall report its verdict to the Court on Wednesday, October 17th, 1928, at 10 o'clock A. M. [16]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Wednesday, the 17th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT — OCTOBER 17, 1928— TRIAL (RESUMED).

The parties hereto and the jury impaneled herein being present as heretofore the trial was thereupon resumed. The jury was thereupon asked if they had agreed upon a verdict and through their foreman answered in the affirmative, and thereupon presented a sealed verdict which was opened in the presence of the jury and read and which verdict was ORDERED recorded as follows, viz.:

"We, the jury, find in favor of the plaintiffs and against the defendant, and assess the plaintiffs' damages at $1800.00.

Dated: October 17th, 1928.

MILO E. DYE,
Foreman."

and the jury being asked if said verdict is their verdict, each juror replied that it is. ORDERED that jurors Jacob Kammerer and Milo Dye be ex-

cused until Tuesday, November 13th, 1928, at 10 o'clock A. M. FURTHER ORDERED that all other jurors in attendance this day be excused from further service upon this court. [17]

[Title of Court and Cause.]

VERDICT.

We, the jury, find in favor of the plaintiffs and against the defendant, and assess the plaintiffs' damages at $1,800.00.

MILO E. DYE,
Foreman.

Dated: October 17th, 1928.

[Endorsed]: Filed Oct. 17, 1928, at 10 A. M. [18]

In the Northern Division of the United States District Court for the Northern District of California.

No. 473—LAW.

H. A. LINDQUIST and SELMA A. LINDQUIST,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 16th day of October, 1928, being a day in the October, 1928, Term of said Northern Division of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiffs and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with on the 16th and 17th days of October, 1928, in said Term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury, the jury having subsequently rendered the following verdict, which was ORDERED recorded, to wit:

> "We, the Jury, find in favor of the Plaintiffs and against the Defendant, and assess the Plaintiffs' damages at $1800.00.
>
> Dated: October 17th, 1928.
>
> MILO E. DYE,
> Foreman."

and the Court having ORDERED that judgment be entered in accordance with said verdict: [19]

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,—

IT IS ORDERED AND ADJUDGED that the plaintiffs, H. A. Lindquist and Selma A. Lindquist,

do have and recover of and from the defendant Sacramento Suburban Fruit Lands Company, a corporation, the sum of Eighteen Hundred ($1800.00) Dollars, and for costs taxed at $39.10.

Judgment entered this 17th day of October, 1928.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [20]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States for the Northern District of California:

Now comes the defendant, Sacramento Suburban Fruit Lands Company, a corporation, by its attorneys, and respectfully shows:

That the defendant, feeling aggrieved by the verdict and judgment thereon in said cause rendered on the 17th day of October, 1928, in favor of plaintiffs and against defendant, for the sum of One Thousand Eight Hundred ($1800.00) Dollars, damages, and costs amounting to Thirty-nine and 10/100 ($39.10) Dollars, hereby petitions the Court for an order allowing the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and that a citation be issued as provided by law, and that a transcript

of the record upon which said judgment was based be sent to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings in this court be suspended and stayed until the determination of the appeal, and that an order be made fixing the amount of surety which said defendant shall give upon this appeal.

Dated: November 24, 1928.

J. W. S. BUTLER,
Of BUTLER, VAN DYKE and DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant. [21]

Service hereof is hereby admitted and receipt of copy acknowledged this 26th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Nov. 26, 1928. [22]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the above-entitled cause, and makes and files the following assignment of errors, upon which it will rely in its prosecution of the appeal from the verdict and the judgment thereon, herein made and entered

on the 17th day of October, 1928, in favor of the plaintiffs, and against this defendant:

I.

The Court erred in overruling defendant's demurrer to the complaint filed in the above-entitled cause.

II.

The Court erred in admitting in evidence a certain book (Plaintiffs' Exhibit 1) and in overruling defendant's objection thereto, as follows:

"Q. Did you, in some way, get one of these books? A. Yes.

Mr. McCUTCHEN.—Mr. Butler, have you a copy of this book that is not marked up?

Mr. BUTLER.—We have only one, which is for our own use. [23]

Mr. McCUTCHEN.—Q. The book did not have any pencil markings in it when you got it, did it?

A. I don't remember.

Q. Well, you don't remember any pencil markings in it, do you? A. No.

Mr. McCUTCHEN.—We offer this book in evidence, solely for the purpose of showing the representations made to these plaintiffs. We do not contend there were any pencil markings in the book when the plaintiff got it.

Mr. KELLY.—The offer is objected to on the ground that if it is offered for any purpose, the whole book is necessary in order that the representations for which the offer is made may be correctly interpreted and construed, and un-

less the book is offered as a whole we object to it for that reason.

The COURT.—Objection overruled.

Mr. KELLY.—Exception.

Mr. McCUTCHEN.—We do offer the whole of the book for the purpose of showing the representations. We have not picked out any particular part of it.

(Plaintiffs' Exhibit 1.)"

III.

The Court erred in denying defendant's motion for a directed verdict, as follows:

"Mr. BUTLER.—I desire to make a motion if the Court please, for a directed verdict. I move the Court to instruct the jury to render a verdict in favor of the defendant upon the following grounds: [24]

(1) That the evidence is insufficient to show that the defendant deceived or defrauded plaintiffs in making the contract referred to in the plaintiffs' complaint for the purchase by plaintiffs from defendant of land.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land purchased by plaintiffs from defendant, or the value thereof.

(3) That the evidence is insufficient to show that plaintiffs have been damaged by any act on the part of the defendant.

(4) That the evidence shows affirmatively that plaintiffs' cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof,

of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiffs' cause of action is not barred by said above-quoted provision of said section of said code.

The COURT.—The evidence is in conflict. It is a question for the jury to determine. It is sufficient if the jury takes that view. Motion denied.

Mr. BUTLER.—Exception."

IV.

The Court erred in holding that plaintiffs had presented evidence sufficient to sustain their cause of action.

V.

The Court erred in not holding that plaintiffs' cause of action was barred by the statute of limitations. [25]

VI.

The Court erred in instructing the jury on the subject of representations claimed to have been made by defendant to plaintiffs, as follows:

"First, the plaintiffs must prove that the representations were made. That is to say that the defendant, to induce this bargain, represented to them that the land was well adapted to commercial orcharding, and worth more than $275 an acre. If plaintiffs prove either one of those representations it is enough to serve that branch of the case, and you proceed to the next step in the case. First, were the representations made? There is no question, Gentlemen of the Jury, that regardless of what Amblad may have said to the plaintiffs and they say he did represent it as adapted to commer-

cial orcharding, the defendant's book does make that representation. The defendant, being a corporation, it speaks by its agents, and its agents may speak orally or by advertising literature, such as this, which, of course, was prepared by some agent. So you find it in the book. No other reasonable interpretation can be placed upon it, and it was admitted in argument that the representation was made to the plaintiffs that the land was well adapted to commercial orcharding. No other reasonable construction can be made of it. It is not a question of how much truth is in the book, Gentlemen of the Jury, the question is whether that representation was made, and whether, as I will subsequently state to you, it was false. [26]

In respect to the allegation that the representation was made, made to plaintiffs that the land was worth more than $275 an acre, both the plaintiffs testify that Amblad did represent that to them. And the brother of the plaintiffs, who was there, testified to the same thing; and Amblad says nothing about that when he testifies. So there are the two plaintiffs and their witness testifying that the representation was made, and no evidence in denial on the part of the witness Amblad, who represented the defendant in that transaction."

VII.

The Court erred in instructing the jury on the question of the falsity of the representations.

VIII.

The Court erred in instructing the jury on the

question of defendant's knowledge of the falsity of the alleged representations, as follows:

"If you find by the greater weight of the evidence that the land is proven to have been worth less than $275 an acre at that time, you proceed to the next step, and that is, that the defendant is not liable in any way unless they know those representations, or either of them were false, or unless the defendant ought to have known it, or unless the defendant made the representations in a positive fashion which presumes knowledge, and which it cannot now deny. Did it know if the land was not adapted to commercial orcharding successfully? Did the defendant know it? It had been handling these lands at that time some eight or nine years. I think the book [27] says it sold the first tract out there in this project in 1921. It had experts, horticultur*al*ists—undoubtedly a man is pretty well presumed to know what he owns in respect to its adaptability to any purpose, especially if he has experts in that particular purpose.

Furthermore, if it did not know it, should it not have known it during all these years that it had it, and selling it out in the market to people on these representations that it was valuable for fruit as a commercial enterprise?

Moreover, it states in this book that it is proven beyond a doubt. Nothing stronger can be said than that, Gentlemen, that it is proven beyond a doubt that this land is adapted to commercial orcharding.

When they made that representation, Gentlemen of the Jury, the law implies they knew whether it

was true or false. If it was false they are bound by it, and would be liable accordingly.

And so in respect to value. If it was not worth $275 an acre, did defendant know it, taking into consideration all their experience with the land? If you find that the defendant did know that the land was not adapted to commercial orcharding, or ought to have known it, or positively asserted, as it did, that it was, the law presumes knowledge, and the plaintiffs' case is so far made, and you proceed to the next step."

IX.

The Court erred in instructing the jury on the question of plaintiff's belief in the alleged representations and their reliance thereon, as follows: [28]

"Then the next step. The law is that unless the plaintiffs believed the representations and did rely upon them, in whole or in part, to some extent, at least, then there is no liability, because if the plaintiffs did not believe them, if they did not influence the plaintiffs to buy the land, they have not been harmed by them, they are simply out of the case, they are superfluous. Did the plaintiffs believe them? They say they did. They were Minnesotans; they knew nothing about California or California fruit, from the practical side, never having been here. All the knowledge they had they got from defendant's literature, and talking with their neighbors, so they say. They so testified. Remember, if your recollection is different from that of the Court, or if your recollection is dif-

ferent from that of counsel as they stated the testimony to you in their arguments, it is your recollection that controls in respect to the evidence.

They say that Amblad came to them after they had read the book first, and told them the same things that were in the book, and that they believed them. He finally told them on the 29th of September, If you don't buy before October 1st the land is going up in price. That appealed to their sense of thrift, and they did sign the contract that night.

It is not necessary that the plaintiff should have intended to start a commercial *office* (orchard). If the seller of land attaches to it an attribute of value and the buyer appreciates it gives a value to the land, whether in the present or in the future, if he did want to sell it again, and he is to some extent influenced by [29] that assigned attribute, that is enough to entitle him to recover, if it is false.

So here, even if the plaintiff had not intended to go into commercial orcharding when it was represented to them that this land was adapted to commercial orcharding, if they appreciated that as something that gave additional value to the land, and they bought it because of it, the mere fact that they did not intend to go into commercial orcharding right away, or at all, is immaterial. But they tell you that they did intend to go into commercial orcharding eventually. They say they followed the plan of the book, which says that there is a long period after planting before the orchard

is in bearing; they must have an income in the meantime, they must go into the chicken business. They tell you that Amblad told them that. Amblad says, however, that he did not tell them anything about commercial orcharding, although he talked about fruit, and that they were only talking chickens. After they got here the plaintiffs followed the book, they went into chickens, and after due course of time they began to grow trees, to test out the land to see what it would do in the way of fruit.

So if you find by the greater weight of the evidence that the plaintiffs believed those representations, and to some extent relied upon them, in whole or in part, and were thereby induced or influenced to some extent to buy by reason of it, the plaintiffs' case is made out thus far. Ask yourselves, What does California stand for in the east, what its trademark is other than climate and fruit. I want to say right here, Gentlemen of the Jury, [30] that the law presumes that all transactions are fair and honest until that presumption is overcome by the evidence in the case. But the resources of California and the State are great enough that they need no false representations to sell them abroad. It is not good for the State. I am not saying there were any. That is left for you. You must not get the idea into your head that just because you are Californians you must uphold the credit of the State and the value of its lands by thinking that that was ordinary puffing for the selling of land, if they were false. If they went beyond that and made false statements, they had no right

to do it. You cannot induce any man to enter into a bargain by false statements and escape liability."

X.

The Court erred in instructing the jury on the question of the measure of damages, as follows:

"Now, the next step. If you find that the plaintiffs were influenced to enter into the bargain, the next question is, Were they damaged? If they were not damaged they are not entitled to recover. And that brings you right back again to the question of the value of the land. If you find the land was worth less than $275 an acre, they are entitled to the difference. If the plaintiff paid $275 per acre for this land and it was not worth that, they are entitled to be made whole in that respect. If you find, and this is simply by way of illustration, that the land was only worth at that time $100 an acre, the plaintiffs should recover the difference between $100 and $200 an acre, or [31] $175 an acre. If you believe it was worth $200 an acre in 1921, plaintiffs would be entitled to recover $75 an acre, and so on. Then there are other damages. The plaintiffs say that after the recommendation was made to them that the land was well adapted to commercial orcharding, they started to try it out with fruit-trees, and they planted some and they died. They did not flourish. Therein they say they spent some hundreds of dollars—$200 for the trees, and to blast the ground and plant them. Cultivation $50. Then they say they spent a certain amount of money for an additional well and a certain plant that otherwise they would not have

spent except for the trees. Well, Gentlemen, I rather think that that might take rank, so far as the well and the pump are concerned, of a permanent improvement for whatever purpose they will see fit to adapt the land to, and I think no damages should be allowed for that. In other words, those matters have not been proven with sufficient definiteness. They admit the plant has some value. It is hardly possible to make out any damage there with any reasonable certainty. So I think you will limit yourselves to the damages on the score of the trees, if you give any damages at all, and to that of the cultivation, and for the blasting of the trees, in such reasonable amount as you may find, not exceeding $250, as you believe plaintiffs to be entitled to, that they have proved that they spent."

XI.

The Court erred in instructing the jury on the question of the discovery of the alleged fraud, as follows: [32]

"But that is not quite all the case, Gentlemen of the Jury. The plaintiffs purchased this land away back in 1921. If they were deceived by false representations, if false representations were made, they were deceived at that time. The law is that they must begin their suit to recover within three years after they discovered the fact that they have been deceived. This deception is secrecy, and plaintiffs are not bound to bring suit until they discover it, and within three years thereafter. The suit was begun on February 6, 1928; so the three years within which they could begin the suit began

on February 6, 1925. Unless you find from the greater weight of the evidence that they did not discover the fact that they were deceived before February 6, 1925, they are not entitled to recover in any event. The statute of limitations would run against them. That is the policy of the law, Gentlemen, and in proper cases it must be enforced. They say they did not discover the fact. They say they came here in 1922, and did some building, wherein they discovered some hard-pan down at eighteen inches, but that that did not mean anything to them. If it excited any suspicion, the plaintiff said he went to Mr. McNaughton, the company's horticultur*al*ist, and McNaughton told him that was not harmful, that all you have to do is to blast that, and that it is really very good for the fruit-trees when blasted, it has lime in it, etc., and is in the nature of fertilizer. I think Mrs. Lindquist testified to the same thing, but I don't remember about that. Anyway, that is what the plaintiff Lindquist says [33] McNaughton told him. Well, remembering, Gentlemen of the Jury, that the plaintiff knew nothing about fruit, and knew nothing about land, and what was essential to successful orcharding, and if he believes the representations in the first place, were they not allayed and quieted, if he had any suspicions, by Mr. McNaughton, the company's horticultur*al*ist—by what he said to him? There is no denial that McNaughton said that. The law in respect to that is that the party who has been deceived, must pursue the inquiry with such diligence as a prudent man,

in the circumstances, would, when he discovered it is the time when the statute begins to run. He is not required to employ experts in order to discover that. It seems here to be a matter of expert knowledge, or experience, to determine whether land is adapted to successful orcharding. You have heard the experts differ on it; you have heard men of experience differ on it. The plaintiff came here without experience. He is not obliged to employ an expert to tell him about it. If, believing the representations in the first place, and he then relied on the further representations allaying his suspicions, he is not bound by the limit of time until he makes the actual discovery. They planted trees in 1924 and 1926; they died after a year or two; they say that for the first couple of years they did fairly well, but that finally they died. Mrs. Lindquist says she went to see Mr. Schei when some of the trees died. Schei was one of the representatives of the company here. He said, so Mrs. Lindquist testifies, "That is nothing; this is sour sap here; a tree is liable to die any place on occasions." She testifies that Schei said, "they died once in a while anywhere; this is the year of sour sap, and that sour sap caused it." That was in 1926. There is no evidence, that I remember, [34] that there was any sour sap in 1926, and she says that is what Schei told her. Anyhow, that was after the time when they would be barred. So that may be dismissed from your mind. If you do not find from the greater weight of the evidence that the plaintiff had knowledge before February 6,

1925, or had notice of such facts that with reasonable inquiry they should have had knowledge, then their suit is in time, and they are entitled to recover accordingly."

XII.

The Court erred in instructing the jury on the statute of limitations as requested in defendant's proposed instruction No. 1, reading:

"You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiffs must show that the fraud occurred within three years of the commencement of their action for relief, or if their action was commenced more than three years after the fraud occurred, then they must show, in order to maintain their suit, that they did not discover they had been defrauded until a date within three years of the time they commenced their action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiffs will be presumed to have known whatever with reasonable diligence they might have ascertained concerning the fraud of which they complain.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiffs have proven by a preponderance of the evidence both that they did not discover the alleged fraud within the period of three years before they filed their action, and that they could not have dis-

covered it by the exercise of reasonable [35] diligence, three years before they commenced this suit. They were not permitted to remain inactive aftr the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them. They are not excused from the making of such discovery even if the plaintiffs in such action remain silent. A claim by the plaintiffs of ignorance at one time of the alleged fraud, and of knowledge at a time within three years of the commencement of their action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiffs contracted with the defendant to buy land. Plaintiffs commenced their action on the 28th day of February, 1928; their contract with the defendant for the purchase of its land was made in September, 1921. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiffs in the making of this contract, then before you can find a verdict in their favor, you must also believe from a preponderance of the evidence that they neither knew of the fraud, nor could with reasonable diligence, have discovered the fraud before a date three years prior to the

commencement of their action, that is, before the 6th day of February, 1925. If you believe from a preponderance of the evidence that plaintiffs either knew of the facts constituting the alleged fraud before February 28th, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant." [36]

XIII.

The Court erred in refusing to instruct the jury concerning the effect of the discovery by plaintiffs of the falsity of a material representation as requested in defendant's proposed instruction No. 2, reading as follows:

"DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiffs' discovery of the alleged fraud that if plaintiffs discovered that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the falsity of any material representation concerning the land.

XIV.

The Court erred in refusing to instruct the jury concerning the distinction between representations of fact and of opinion, as requested in defendant's proposed instruction No. 4, which reads as follows:

"DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation."

XV.

The Court erred in refusing to instruct the jury concerning the effect of plaintiffs having been able by reasonable diligence to discover the alleged falsity of representations as to [37] value, as requested in defendant's proposed instruction No. 5, reading as follows:

"DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered, the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant."

XVI.

The Court erred in instructing the jury that defendant, by its book, represented plaintiffs land to be well adapted to the growing of deciduous fruits commercially, and also that the statements in de-

fendant's literature applied to the land purchased by the plaintiffs.

To all of which the defendant duly excepted.

WHEREFORE, defendant prays that said judgment be reversed and held for naught, and that defendant be restored to all which it has lost by reason of said verdict and judgment.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND.
EDWARD P. KELLY.
EDWARD P. KELLY.

Service hereof is hereby admitted and receipt of copy acknowledged this 26th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Nov. 26, 1928. [38]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 16th day of October, 1928, the above-entitled cause came regularly on for trial before Hon. George M. Bourquin, Judge of said District Court, and a jury impaneled and sworn to try said cause and the issues presented by the complaint of the plaintiffs and the answer of defendant, plaintiffs appearing by their attorneys, George E. McCutchen and Ralph H.

(Testimony of H. A. Lindquist.)

Lewis, and the defendant by its attorneys, J. W. S. Butler and Edward T. Kelly; and thereupon the proceedings taken, the evidence given, the objections made, the rulings thereon and the exceptions thereto were as follows:

TESTIMONY OF H. A. LINDQUIST, FOR PLAINTIFFS.

H. A. LINDQUIST, one of the plaintiffs, a witness on his own behalf, testified:

I am one of the plaintiffs here. In 1921 I was living in St. Paul, Minnesota. My occupation back there was cabinet-maker. I had never been to California, and did not know anything about [39] California fruit lands. I knew nothing about the value of California lands.

I got one of these books. I do not remember any pencil markings on it when I got it.

Mr. McCUTCHEN.—We offer this book in evidence, solely for the purpose of showing the representations made to these plaintiffs. We do not contend there were any pencil markings in the book when the plaintiff got it.

Mr. KELLY.—The offer is objected to on the ground that if it is offered for any purpose, the whole book is necessary in order that the representations for which the offer is made may be correctly interpreted and construed, and unless the book is offered as a whole we object to it for that reason.

The COURT.—Objection overruled.

Mr. KELLY.—Exception.

(Testimony of H. A. Lindquist.)

(The book was received in evidence as Plaintiffs' Exhibit 1.)

WITNESS.—I got that book from Mr. Amblad in my home in the latter part of September, 1921. I did not send for Mr. Amblad. I talked to the neighbors around there who bought already. Mrs. Anderson told Mr. Amblad about it, so he got hold of it and came over to my home in the evening, about six o'clock. My brother and sister-in-law and my wife and Mrs. Anderson were there. He told me about these lands that he was selling out here, and the kind of people they were selling to. He said Mr. Bean was the owner of the land, and he wanted nice clean people and he was very particular about that, so he thought we were all right. He said he had a very fine piece of land to sell for thirty-two hundred fifty dollars that [40] would just suit me, ten acres. He said it was worth more, because the land was going up on October 1st. He said it was good for all kinds of fruit for commercial use. He talked about the chicken business, too. He told me the best way to get started out here to get independent was to start with seven hundred pullets and when you get an income from the pullets you can, in the meantime, plant the land, and in that way you can be independent in two or three or four years. I read the book the whole evening and he talked about the same that is in the book. I believed those things he told me about fruit raising, and the things I read about fruit

(Testimony of H. A. Lindquist.)

raising in the book. I signed a contract that evening. I recognize my signature.

(The contract, dated September 29, 1921, between the plaintiffs and defendant, was received in evidence as Plaintiffs' Exhibit 2.)

The things they told me from the book and orally about the fruit land and the value of the land had an influence on me when I signed the contract. I believed all that the book said, and so I talked it over with my wife and I thought it was a fine proposition. What Mr. Amblad said had an influence on me in signing that contract. He was a smooth talker.

I came to California in February, 1922, and moved on that land right away, and put up a house there. I first found hard-pan when I started to dig in the ground. It was in the same spring, but I cannot exactly tell the date.

Q. Did you just go down to the top of the hard pan, or did you go into it a way?

A. I struck the hard-pan and I was stuck there; some places it was a little deeper. [41]

WITNESS.—Over the hard-pan the soil is of an average of about eighteen inches deep. I did not go to the company when I saw the hard-pan to see if it was going to interfere with fruit raising. I waited till Mr. McNaughton, the agriculturist for the land company, came around. I asked him about the hard-pan, and he said that is something very good for the fruit when it gets blasted, so I was satisfied with that. He said, "You blast it first

(Testimony of H. A. Lindquist.)

and when the tree don't do so good you can blast to the side and that contains a whole lot of lime and potash," and all that stuff. I didn't understand it.

I did not find out how thick the hard-pan was until I dug the well pit in the fall of 1926. The hard-pan went down sixteen feet. It was probably a little softer in the bottom at sixteen feet, and all the way down it was hard. We had to blast it.

I planted eight trees on the land in 1924 and in 1925 I planted seventy. I hired cultivation for the trees and cared for them. I watered them about every two weeks. Thirty-five died in 1927. There are now thirty-six living and fifty-two of all my trees are dead. I don't think that was because of any lack of care. I sent my wife to Mr. Schei, and she talked to him.

When I dug the pit I spread some of the hard-pan on the lawn, because I thought it was good stuff. I mashed it up and left some lumps on top. They have broken up.

The blasting and the planting of the trees cost me two hundred dollars, and it cost me about fifty dollars to cultivate them.

I put in a small pump at first, which was sufficient for the chicken raising and my home. When I decided to go into fruit I put in a larger pump in 1926 and an irrigation system. The pump [42] was a Superior Pump with a three horse power motor, and for an irrigation system I bought twenty-two hundred feet of pipe. That was for

(Testimony of H. A. Lindquist.)

irrigating the orchard. The pipe cost about two hundred dollars. I put in a pressure system that cost five hundred seventy-five dollars in all, which included the cost of the well pit, which was thirty dollars, so that would leave four hundred ninety-five dollars, and that includes the pump and the pressure system. My old pump I could use for my chicken business and my house. I paid one hundred eighty-two dollars for the old pump and sold it for fifty dollars. I think the new one is now worth about two hundred dollars.

Cross-examination.

I am forty-six years old. I came from Sweden in 1911. I first heard about the Rio Linda lands when my neighbors spoke about it. They bought land here and they were talking about it, and I saw a book from the land company that I read in my neighbor's house. That was about the same month I bought. Mrs. Anderson was my neighbor. I know Mr. Peterson, but we never talked about it. I know that he bought land. I know Mr. Carlson, and I know that he bought land. Before I bought my land I talked with Mrs. Anderson, but not with Mr. Anderson.

I did not get a book from Mrs. Anderson; I read it in her home.

Mr. Peterson, Mr. Anderson, Mr. Carlson and myself worked in the Railroad Shops in St. Paul, but in different departments. We never saw each other. We were all in the same kind of work and had been for a long time.

(Testimony of H. A. Lindquist.)

I talked with Mr. Peterson about the Rio Linda property after I bought, not before. I knew that he bought out here, but I [43] never talked with him. Before I bought I knew that Mr. Peterson had been out to the Rio Linda country.

I read this book the same evening I put in my name. That was the second time I read it. I first read it at my neighbor's, but did not read it so particularly. The night I bought I read the book nearly all through. Mr. Amblad was at my house that night for three and a half or four hours. He got there about six o'clock and left about half-past ten or eleven. During all that time my wife and my brother and his wife were there, and we were all talking about the Rio Linda country. It is a fact that the only reason I signed that contract that night was because of what I read in the book and what Amblad told me. That was the only thing that influenced me. I was interested in California before I saw Mr. Amblad, but not so long. I became interested when I read the book the first time, and when Mrs. Anderson talked to me about that country. She did not tell me it was a fruit land country. She never said anything about that. She told me it was a poultry country. Mr. Amblad told me it was a poultry country, and the book told me that it was a poultry country and a fruit country. The book told me that. I intended to go into the poultry business in California and fruit, the poultry business first to get a start. My health was not very good there. I had stomach trouble

(Testimony of H. A. Lindquist.)

and had been doctoring for a long time before this. My doctor had told me that I ought to get away from that climate in Minnesota. He didn't tell me that I should move to California for a warmer climate. I did not tell Amblad I had to go to California because my doctor told me I had to get into a warmer climate. I did not tell Mr. Peterson anything of that kind. Neither Mr. or Mrs. Peterson were present when Amblad was talking to me. [44]

It was four months after I signed my contract until I went out to California. Before I signed my contract I had learned what Peterson and Anderson paid for their land. I think Anderson paid two hundred seventy-five, and I don't know exactly how much Peterson paid. I did not know in a general way what the land in Rio Linda was selling for before Amblad came to my place that night, but I did know what Anderson paid. In four months I went to California and took my wife and stayed, and this was the first time that I saw my land. There were some improvements on the land at that time, a small chicken-coop and a well, which was supposed to be one hundred forty-seven feet deep. It was cemented up. I could not examine the soil of that well at that time. It was only a ten inch hole.

Q. What did you do about looking over your land and looking at the soil?

A. Well, I don't understand much about it. I was satisfied with it.

(Testimony of H. A. Lindquist.)

Q. Then you mean you didn't do anything, is that right? A. I built up a little house.

WITNESS.—I did not talk with any of my neighbors there about the soil nor about the land. I saw fruit orchards in another district there, but not where my lot was.

Q. What are the people doing in that district; what is their business?

A. It was all a new settlement there and I was the first one in the whole square.

Q. You were the first one to settle there?

A. Yes. [45]

Q. In the next district out around there, what was the general business in Rio Linda?

A. Well, they had chickens, to start with, just like I was trying to do.

Q. Well, the principal thing, Mr. Lindquist, and then we will pass on, was—

The COURT.—Just a moment, just a moment. Let him answer. Don't run over him.

Mr. KELLY.—Q. What was the business you saw there in the Rio Linda district?

A. I didn't see any business, at all, except chicken-coops.

WITNESS.—I first planted eight fruit-trees in 1924, and in 1925 I planted seventy, and I planted again in 1926 when I replanted ten that died. I did the planting myself. I did not take care of those trees. I hired that done. Three or four different people did it for me—Mr. Johnson, a neighbor, Mr. Thom and Mr. Grunhoffer.

(Testimony of H. A. Lindquist.)

After I got to Rio Linda I got a job in the Southern Pacific shops as a cabinet-maker. That is the same place where Mr. Peterson and Mr. Anderson went to work later on. We are still working there in the railroad shops.

I improved this farm. I had to make my living. I worked as much as I could over there. This photograph is a fair picture of my place.

(The photograph was offered in evidence as Defendant's Exhibit 5.)

Redirect Examination.

I did not find out before 1927 that that land was not fruit land, nor that it was not worth two hundred seventy-five [46] dollars an acre. Before 1927 nobody told me that that was not fruit land there, nor that it was not worth two hundred seventy-five dollars an acre. When Mr. Davis was out there we dug hard-pan up together.

TESTIMONY OF SELMA A. LINDQUIST, FOR PLAINTIFFS.

SELMA A. LINDQUIST, plaintiff, testified as follows:

I am the wife of Mr. Lindquist, who was just on the witness-stand. In 1921 we were living in Minnesota. I had never been to California. I knew nothing about California fruit lands or their value. I was present when Mr. Amblad came to our house in September, 1921. He had a map and a book that he showed us, and he said he had ten acres of fruit

(Testimony of Selma A. Lindquist.)

land for sale and he wanted us to buy. We talked it over. He showed us the book. We all read it that evening. He said that the price was now two hundred seventy-five dollars; that it was worth more than that, but they were selling it at that before October 1st, and then the price was going to be raised, and on January 1st it was going to be raised another hundred dollars. The land was going very fast. We signed the contract that evening. He said he would have to see Mr. Bean about it before he could sign. He said Mr. Bean always wants to meet the people that go out there to see if they are all right. He thought Mr. Bean would let us come here, and if we couldn't go out, we could just tear this contract up. He said Mr. Bean was a rich man who had this Haggin Grant Ranch for sale. He said he was selling it to nice working people, giving them a start in life.

He said we should plant a family orchard, some trees of each kind, and the rest we should plant in a commercial orchard, all of one kind. He said it was good land, rich and fertile and it was real fruit land. [47]

I signed this contract with my signature at the bottom, and in signing it I believed the things that Mr. Amblad told me and what I had read in the book. They influenced me to sign it. Then we came out here in 1922, and moved on the land. We did not plant our trees until 1924. We did not get the power out there. We were supposed to have it, but we did not get it before 1925. The first year

(Testimony of Selma A. Lindquist.)

the trees were doing good. We planted eight trees in 1924 and then we planted seventy trees the year after. Some of them died, and my husband planted ten more, and now fifty-two of them have died. When the trees died in 1927 I went to see Mr. Schei, who is the resident secretary of the Sacramento Suburban Fruit Lands Company. I told him the trees were dying, and it looked like we cannot even get a family orchard out there to grow. He said it was sour sap. He didn't say much about it. He said a tree will die once in a while. I said, "It looks to me we cannot get even a family orchard. Won't you take five acres back? He said, "No, the company cannot do any such thing, because they have too much land to sell themselves." About the trees dying, he said trees were dying all around from sour sap.

Q. Did you believe from what he told you that your land was still adapted to fruit raising?

A. Well, we didn't know. We had just put in the pumping plant then. That was in 1927, and we had between two and a half tons of pipe, and we planned to go ahead and get the land ready and plant it and get an income.

WITNESS.—The pipe is still laying there. I don't think we could get much out of it. [48]

I did not find out before 1927 that that land was not adapted to raising fruit. Nobody ever told us it was not. Mr. McNaughton told us that if we blasted it was all right. We believed what Mr. McNaughton said. We never heard from anybody

(Testimony of Selma A. Lindquist.)

that it was not worth two hundred seventy-five dollars an acre. People thought we did not pay much. The others paid more.

Cross-examination.

We first met Mr. Amblad in our house in St. Paul, Minnesota, in September, 1921. That was the night he came over there and sold us the land. I had never met Mr. Amblad before. Mrs. Anderson introduced me to Mr. Amblad right there. She was with him at our house that night. I did not meet him the day before. The contract that my husband and I made, that was all done at the same time that my brother-in-law and his wife signed a contract. He came over to our house. They also had a little money and they thought it was nice to come out here and have the land.

We had talked about going to California before. We read the book with some of the neighbors, and we thought it would be better than what we had then. I talked with Mrs. Anderson and Mrs. Peterson, not much with Mrs. Peterson. They had never been in California. Mrs. Anderson did not come for three years afterwards. I knew Mr. Peterson had been to California but I did not talk with him.

I did not know what the price of that land was before I saw Mr. Amblad. He told us it was going to go up. Before I saw Mr. Amblad Mrs. Anderson told me that we would have to pay two hundred seventy-five dollars an acre. It did not take very long for Mr. Amblad and us to make this deal; it

(Testimony of Selma A. Lindquist.)

was three or four hours, [49] because it would soon be October 1st and it was going to go up to three hundred dollars, and that would make a lot of difference.

We went out to California in February. We did not hear anybody say at that time that we had paid too much for the land. It had already gone up to four hundred dollars. There was no sign around there advertising land for less money. There were not many families. I don't think there were more than eighty families around there then.

Q. But from real estate dealers; did they not have signs around on the highway and on the roads advertising land?

A. When we came out there it was wet. The Land Company took us out there and we were not around much because it was so wet.

WITNESS.—I have lived on the place all the time, and my husband has been working in the railroad shop, together with Mr. Peterson and these other people, not in the same department, but in the same shop. We hired care for the place and the trees, and I did a lot myself.

We went into the poultry business. The most we had was nine hundred chickens. We have a hundred seventy-five now. We had nine hundred chickens a couple of years after we came here. First we had four hundred fifty, and we added to them. We went into the poultry business as soon as we went on the place; we were to make our money that way to plant our trees.

(Testimony of Selma A. Lindquist.)

Q. Your other neighbors around there, what business were they in at that time?

A. There were no people there. They were to start out with chickens and make a living on chickens, and then plant when they got the land ready. [50]

Q. And you took care of the chicken business yourself? A. Yes.

TESTIMONY OF JOHN LINDQUIST, FOR PLAINTIFFS.

JOHN LINDQUIST, a witness for plaintiffs, testified:

I am a brother of Mr. H. A. Lindquist, and was at his home when there was a conversation with Mr. Amblad on September 29, 1921. The conversation took some hours. During that time Mr. Amblad said with reference to the value of these lands that he had land to sell for two hundred seventy-five dollars an acre, but that it was really worth more than that, and it was going to go up on the first of October.

Cross-examination.

That night was the first time I saw Mr. Amblad. I had read the book before and I had heard about it, but I never decided to go out before that night. I work with my brother in the shop. Peterson and Anderson and Carlson work there also, but in different departments. Those men all bought land in the Rio Linda district before I did. Mrs. Peter-

(Testimony of John Lindquist.)

son, I think, had been out there and looked at the country. I had not intended to go to California before I bought this land. My health was pretty good.

TESTIMONY OF HOWARD D. KERR, FOR PLAINTIFFS.

HOWARD D. KERR, a witness for plaintiffs, testified:

I am a real estate broker and have been in the real estate business for twenty-two years in Sacramento County. My office is in the Nicolaus Building. I have had experience dealing in country lands in this county practically all of the time. [51]

I am familiar with the Rio Linda district, and particularly with that section known as Vineland. I appraised the lands of H. A. Lindquist, described as Lot Number Nineteen of Vineland, as of the 29th day of September, 1921. At that time the value of the land was seventy-five dollars an acre.

Cross-examination.

I have been in the real estate business twenty-two years right here in Sacramento. I first saw this tract yesterday. I was there about twenty minutes. I walked all over it. I looked at the soil in a general way from the surface. I did not make any borings. I don't know how deep the soil is in any part of it.

I noted the improvements on the land. The

(Testimony of Howard D. Kerr.)

gravelled highway is right there, running east and west.

It is located in a district where the industry is mostly poultry. I am not familiar with the workings of the Association in the poultry district.

In fixing my value of that land I took into consideration an industrious and thriving industry. I did not take into consideration the possibility of fruit production, and I say that the value of the land at that time was seventy-five dollars an acre. I did not take into account the possibility of fruit raising, because I don't believe it can be done successfully. I don't think it is general in that location.

When I looked at that land I looked at it with the idea that it was not in a fruit-raising district, but from the standpoint of a man wanting to live out there and wanting to raise chickens. It had two or three acres of rather low land, but that is a benefit to the high land, so that it gives it the proper drainage. I took into consideration the roads and what other land could be purchased [52] for with similar soil and conditions.

I never bought or *soil* any land in the Rio Linda district. I know of a lot of it being sold in 1921, no particular place, but just generally. I don't know of any land having been sold in that district as low as seventy-five dollars an acre. I do not know what lands were being sold for there at that time, in 1921.

(Testimony of Howard D. Kerr.)

Q. Don't you take into consideration in fixing the value of that land back there in 1921 what other lands were selling for out there?

A. Not specially, no. Many lands are sold in subdivisions at a very high price, due to the attractive terms that can be given, or due to some exchange that is being made where they get that value by making a deal on the other property.

Q. As a real estate man, fixing the value of property, don't you take into consideration what other people are paying for land of the same kind and character in that vicinity?

A. Not necessarily in that same vicinity. Other locations are taken into consideration.

Q. That has nothing to do toward fixing the value of that land? A. No, sir.

WITNESS.—I am acquainted with the Del Paso Heights district. I think it is about five miles north of Sacramento. We generally figure from the subway out here. I would say it is about five miles from the land of Mr. Lindquist, which is further to the north than Del Paso.

I acted as an appraiser of the land in the Del Paso Heights district in a suit involving the Great Western Power Company—I don't remember when that was, and as such appraiser I afterwards [53] gave testimony in the action of the Great Western Power Company *versus* T. Wah Hing.

Q. Were you asked this question, and did you give this answer in that case:

(Testimony of Howard D. Kerr.)

"Q. Are you familiar with the lots over which the plaintiff in this case seeks to build a power line? A. Yes, sir.

Q. Known as Lot 11, Block 22, 26 and 27, of East Del Paso Heights. What, in your opinion, Mr. Kerr, would be the reasonable market value, if sold for cash, of the lots cut up there during the month of January, 1927, if given a reasonable time to find a purchaser?

A. About $200 per lot on the south side, between that and $250 on the north side."

Were you asked that question, and did you give that answer? A. I did.

Q. How large an area is the lot you were speaking about in that testimony?

A. I don't remember at this time. I knew at that time, but I don't remember now.

Q. Can you give us an estimate, taking an acre as a basis, how many of those lots in an acre?

A. I don't know whether they were quarter acres, or not. I believe that further down we gave the size, I am not sure.

Q. I don't care exactly about that, Mr. Kerr. How many lots in an acre?

A. That would depend largely on how the tract cut up as to roads, whether you measured to the center of the road, or not; they don't [54] usually measure to the center of the road, they measure from stake to stake, inside measurements.

Q. Now, coming back to the consideration you had in fixing the value, let me ask you this question

(Testimony of Howard D. Kerr.)

as a real estate man: Assuming that the land in the Rio Linda district, in the subdivision where Mr. Lindquist's lot is, assuming that that land is adapted to the successful growing of deciduous fruit, what, in your opinion, would that land be worth in September of 1921?

A. $75 an acre.

Q. It would have no greater value if it were adapted to the growing of fruit? A. No, sir.

Redirect Examination.

Mr. McCUTCHEN.—Q. In fixing the price on this Del Paso Heights property, was that as agricultural land, or city lots?

A. City lots.

Q. Counsel has directed your attention to whether you considered certain thriving business out in the Rio Linda district. Did you find any thriving business out there? A. I did not.

Q. Do you know anything about hard-pan conditions in Rio Linda? A. Just generally.

Q. Did that, in any way, influence your answer about assuming that it was fruit land?

A. Well, it is not fruit land.

TESTIMONY OF ADOLPH STERN, FOR PLAINTIFFS.

ADOLPH STERN, a witness for plaintiffs, testified:

I live in Rio Linda. I have lived there since 1922. In [55] 1923 I planted five hundred thirty

(Testimony of Adolph Stern.)

trees, five acres in Kadota figs, and in 1924 I planted my family orchard of twenty-seven trees. I had them cultivated. I watered them and cared for them generally. They done pretty fair the first two years, and after that they started to grow more uneven every year. Their present condition is small and stunted looking, except about eight or ten trees in one spot where there is deeper soil.

My soil averages from five or six inches to three and a half feet or four feet in depth in that one particular spot. I can tell the difference in the growth of the trees according to the depth of the soil. Where there is about a foot of soil the trees grew a foot and a half in these five years. The trees that are standing in four feet of soil are eight or ten feet high. I blasted fourteen holes for my trees. I am not able to tell any difference in the growth as between the blasted and the unblasted part. I have made an observation around the district generally. I am living out there and I was interested in Kadota figs, and I observed principally the Kadota fig orchards around there. I have observed ten or more people trying to raise Kadota figs. I have been around their orchards quite often. I have watched their orchards ever since I planted mine, because we had a kind of rivalry between ourselves as to who could grow the best trees.

Q. Can you tell us from your observation whether that hard-pan land with only a foot or two of soil deep on top of it is at all adapted to the raising of fruit-trees? A. No.

(Testimony of Adolph Stern.)

Cross-examination.

If I had four or possibly five feet of soil like I have on that small spot I would have nice trees. My judgment is that [56] it takes four or five feet at least to grow trees. The soil on my place is four feet deep, I think, in the deepest place, and the most shallow is possibly six inches.

I am well acquainted with that district. I am living there for six years, and am well acquainted with the different and varying depths of soil. The soil does not vary much out there, two or three inches or so. It is all about the same.

I know where Mr. Posehn's place is. I have seen his vines. He ain't got a commercial orchard. He has just a family orchard. I am acquainted with Mr. Hagel's place. I don't know what the depth of his soil is.

I am a plaintiff in a lawsuit of the same character as the one we are trying, and I have been contributing to a fund for the expense of maintaining this litigation.

Redirect Examination.

Q. Did you see any good fruit orchards on the Posehn or Hagel places?

A. There is a few nice trees. My family orchard looked just as good before 1927.

Q. Do you know how old those trees are?

A. I don't know exactly, but two or three years old, or four years old possibly.

(Testimony of Adolph Stern.)

Recross-examination.

My orchard looked just as good before 1927.

Q. In 1927 trees generally over the country died from sour sap, did they not?

A. Yes; out of twenty-seven I lost twenty-four. There were three left. [57]

Q. Have you seen the Posehn and the Hagel orchards since 1927? A. Yes.

Q. They look just the same, don't they?

A. I seen in Hagel's orchard some dead trees last week.

TESTIMONY OF H. L. FREDERICKSEN, FOR PLAINTIFFS.

H. L. FREDERICKSEN, a witness for plaintiffs, testified:

I used to live at Rio Linda. My general occupation is that of farmer. I have done farming pretty nearly all my life.

I tried to raise some trees in Rio Linda. In 1924 I planted sixty-seven or sixty-nine. I cared for, cultivated, watered and pruned those trees. The soil on which they were planted was from eight inches to twenty-four inches deep. They done pretty well the first year, then they commenced to die out. About half of them have died out, I guess. We cultivated them last spring, plowed and disced them, but they have not been watered. When we stopped working on them they looked fairly well. About thirty or thirty-five were dead.

(Testimony of H. L. Fredericksen.)

I made an effort to do general farming on that land. I sowed some wheat there and got about three sacks to the acre, and I sowed some barley. It didn't pay to work it.

Cross-examination.

My place is about a mile and a half from Mr. Lindquist's. It is all the same kind of land all through there. Generally over the whole district the land is about the same.

I don't know what is the chief industry in that district. I guess most of them have poultry to get something to live on. I am not in the poultry business. Part of the time I was. I went out of the poultry business about a year and a half ago, late in the fall of 1927. [58]

I am a plaintiff in a lawsuit of similar character to the one we are trying. I am also a contributor to a general fund for the maintenance of this kind of actions.

Redirect Examination.

My case was tried about a month ago.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFFS.

HERBERT C. DAVIS, a witness for the plaintiffs, testified:

I am an agricultural specialist of the firm of Techow & Davis, Engineers and Chemists. My office is located at 621 "I" Street, Sacramento. I

(Testimony of Herbert C. Davis.)

have been there about three and a half years. During that time I have had a great deal of experience testing soils, making chemical analyses and borings and investigating land to determine what it is adapted to. I have had a great deal of experience along that line.

Before that I was manager of the United Orchards Company at Antelope for several years. Some of the property we had there adjoined Rio Linda Subdivision No. 6 on the northeast corner. We were orcharding there. While there I had occasion to test soils and make observations and comparisons between actual conditions and what I found by my tests. Prior to that time I had no practical experience to amount to much. I studied at the University of California prior to that time for about a year and a half and then more afterwards, making about three years work there altogether.

I examined the land of H. A. Lindquist, Lot Nineteen of Vineland. I made some borings there to determine the depth of soil. The figures on the map numbered one to twelve are numbers giving the borings. Under that are some dots; also dots with circles around them. The dot without the circle indicates a sounding made [59] with a steel rod to determine the depth to hard-pan. The dot with a circle indicates a boring. The figures in parentheses underneath the number of the borings are the depth to hard-pan in inches. The map shows the situation correctly. The cross section

(Testimony of Herbert C. Davis.)

clearly shows the situation. The strip of clay shown on the map is four or five inches thick. That is a gray adobe type of clay. The surface soil is the characteristic red sandy loam, San Joaquin type, and it is underlaid with this strata of gray clay. That is something I had not discovered in that district before.

(The chart was offered in evidence as Plaintiffs' Exhibit 4.)

I made an analysis of the samples taken there. In making our borings as shown on the map we took the series of three principal lines across the property and made one boring in each of those sections so as to give a fair accurate sample of the ten-acre tract. I tried to get a sample of the raw land as it would be without preparation, and avoided any place where it was obvious that fertilizer had been applied. We took the samples from the surface to the hard-pan and included the clay. The test we made was of a composite sample. I made a chemical analysis of that. We used one of the recognized methods. We treated the soil with a strong hydrochloric acid solution and took out the total acid soluble material in the soil.

Q. What is the result of that test?

A. Potash .10 per cent, equivalent to 4,000 pounds per acre-foot. Phosphoric acid, .055 per cent, equal to 2,200 pounds per acre-foot. Lime .186 per cent, equal to 7,440 pounds per acre-foot. Nitrogen .310 per cent, equal to 12,400 pounds per

(Testimony of Herbert C. Davis.)

acre-foot. Humus .35 per cent, equal to 14,000 pounds per acre-foot.

Q. I take it that the last three elements you mention are not [60] particularly important here: Is that true? A. No, they are not.

WITNESS.—The potash content is about one-third the amount we would expect to find in medium soil, or even a fairly poor soil.

Q. What about the phosphoric acid?

A. That is just about the limit of adequacy. If it were any less it would be entirely deficient. It is not the content we would find in a fertile soil.

WITNESS.—I have made a number of other tests in that district. This is the highest result of phosphoric acid that I have obtained so far, .055 per cent, equivalent to 2,200 pounds per acre-foot. The only way I can account for it is the nature of the soil.

There is a different situation in the clay stratum, showing there was a deposit of clay different from usual throughout the tract.

I made an examination of hard-pan on this place. I recognize that specimen shown me. It came from the west side of the tract, near the chicken-house. Mr. Lindquist and I dug that out. That is the surface hard-pan as it comes in contact with the soil. We dug into it I should judge about five or six inches. It was quite uniform for that depth. This reddish stuff went on for five or six inches.

I did not make any investigation in well pits to determine how thick the hard-pan was on that

(Testimony of Herbert C. Davis.)

tract, but I have on surrounding tracts. We have been in a good many of the well pits over that whole section. I found the hard-pan ranged from six to [61] forty-eight feet in thickness in so far as it is exposed. In general, the hard-pan is stratified to some extent. This material there occurs right at the surface, and is somewhat harder than the material found right underneath it. Generally it grades off into a white material of the same general character. It is simply a sandstone made up of finer grains than this material. It is somewhat softer mechanically, but from an agricultural standpoint it could be considered all the same thing.

From my investigations there I am able to tell whether this tract of land is at all adapted to raising any kind of fruit. It is not.

Depth of soil is the very first requirement in the commercial production of fruit, a minimum of about five feet of soil being usually considered necessary to permit the proper area for the feeder roots of the trees. They generally occupy the surface three feet of soil. The other roots of the tree go down into the lower strata, forming an anchorage and taking up moisture. Five feet of soil provides an area for the storage of moisture, and it also provides drainage, so that there is no excess water standing around the feeder roots of the tree.

In that particular type of soil it would not be practicable to blast and so provide drainage. The thickness of the hard-pan is too great. When hard-pan is of medium thickness, not to exceed two and

(Testimony of Herbert C. Davis.)

a half feet, and it is underlaid by soil or sand, then, blasting through the hard-pan you simply eliminate the hard-pan phase of it and make contact through that that provides drainage to the root area. On this land you would blast out a pot hole or basin in the hard-pan and of course it would be filled up with loose material, and the roots would penetrate down into that and during the winter storms it would hold an excess of water and you would [62] eventually drown out the tree. It would not be down deep enough to avoid the feeder roots of the trees. They would go down there.

Sour sap is confined almost exclusively to shallow lands, and to lands that are poorly drained and have clay substrata. It is due entirely to the standing of moisture around the roots of the tree.

Q. So that if a tree dies of sour sap it dies because its roots are covered with too much water; is that it?

A. During certain seasons of the year and changes in the temperature.

Q. How about the character of this top soil, as to its adaptability to raising fruit? Does the clay help any?

A. No, the clay would be a detriment. That would be one of the causes of sour sap.

Q. What about the rest of the surface soil. Would that be good for fruit raising?

A. What there is of it would be all right. Some fertilization would have to be practiced. It is deficient in potash, and just about the limit in phos-

(Testimony of Herbert C. Davis.)

phoric acid. Without fertilization and spending some money on it you would not get the vigorous growth to a tree that you would expect to get on fertile soil.

Cross-examination.

I am nearly thirty years old. I am not a graduate of the University of California. My schooling there covered altogether a period of about three years. Since then I have been in practical work and also some further educational work, but not to amount to much.

The figures I have given do not represent total content of [63] phosphoric acid. They are the total acid soluble content. They are not the total content of those two elements, because granite runs quite high in potash, as high as two or three per cent. I could make a total determination, but for agricultural purposes it would be perfectly obvious that it would mean nothing. At any rate, I did not do it.

In the analysis that I made I used what is called the strong acid soluble method. It was formerly a method used by the Association of Official Agricultural Chemists. Practically all of the authorities we have to refer to for comparison of results are based on that work. It is the strong acid soluble test. We have two acid soluble tests for soil, each one designed for a specific purpose. This one is designated as the strong acid. With this test on the sample, I had, I did not get the total content

(Testimony of Herbert C. Davis.)

of acid and potash. That was the test formerly used by the Association of Agricultural Chemists. That is a national organization. It is limited to chemists who are employed in state or Government or official work. The ordinary chemist is not a member. In so far as it affects work being governed by State or Federal law, the organization advises and sends out from time to time the more modern standard and tentative methods of analyses. The balance of it is simply a matter of guidance. The test I used was the one formerly used or recommended by this Association. I could not tell exactly when they abandoned it. It was some time ago. They have not adopted an official method since then. They simply have a tentative method, because there has been too much argument among chemists as to the purposes of soil analysis. I do not mean that chemists do not agree. The ordinary purpose of a soil analysis, so far as follow it in practice, is to recommend certain fertilizers that might be used. Enough has been made to determine how much of [64] that material is available to the plant, but we have not been able to agree on that, so we simply have to fall back to the amount that is probably available, and if there is soluble in strong acid, there is a chance that it might be available.

Q. What is the fusion test, Mr. Davis?

A. Taking a sample of soil and melting it at a high temperature, in conjunction with sodium carbonate, and other materials, so as to render abso-

(Testimony of Herbert C. Davis.)

lutely every atom of plant food or any other substance that you want to determine in the food soluble in either acid or water, so that the total amount can be extracted.

Q. And you are bound to have the total content in that test, are you not?

A. You are bound to have the total content in regard to that.

Q. With the same sample of soil, and with the fusion test, you and other chemists would get the same result of the content of the soil, would you not, from your analysis?

A. We certainly should.

WITNESS.—It is my opinion that five feet of soil is required for the successful growing of fruit. I have not found in my experiments and in my work orchards successfully growing on soil of less than five feet. I have found trees of various ages on soil under five feet, depending upon the type of fruit. I know of almond trees twenty-five or thirty years old on less than five feet, and I know of olive trees, peach trees and such trees as that. I have never found any of that great age.

The Antelope district is an almond district. I don't know how celebrated it is. We have big trees there and that soil is under five feet on an average. On the particular tract I operated [65] myself we had an average depth of about four feet of soil. We found that that is not enough soil to successfully grow almonds. Before I bought that tract of land I learned in school that it required at

(Testimony of Herbert C. Davis.)

least five feet of soil to successfully grow almonds, and that was true as to the successful growing of any deciduous fruits, and with that knowledge I invested my money in that tract, which I afterwards operated in that district, for a specific purpose.

Redirect Examination.

We were there seven years trying to raise fruit on this Antelope tract. The operation was very unsuccessful. We operated altogether about a hundred and fifty acres of land, and during that seven-year period we lost, I should say, about forty-seven thousand dollars. We were going at the thing on rather a large scale for certain reasons.

Q. You said there was no reason why there should be any variation between two chemists making a fusion test. Is the test you have given us, the strong acid soluble test, an exact method of analysis on which two people should not differ?

A. Why, certainly.

TESTIMONY OF LAMBERT HAGEL, FOR DEFENDANT.

LAMBERT HAGEL, a witness for defendant, testified:

I live in the Rio Linda district, where I own forty acres of land. I have owned it a little over five years. There are fifty-eight fruit-trees that I planted on part of the forty acres, which constitutes a family orchard, in a number of different

(Testimony of Lambert Hagel.)

varieties. I have thirty-six different varieties. [66]

The depth of soil where the family orchard is planted is on soil from six inches to twenty-four inches. There is hard-pan underneath that soil. I blasted for every one of the trees. I blasted in the fall, and planted the trees in the spring. One of the holes showed no drainage in the spring, and I blasted that again, and it is all right. Ever since that time I have had drainage in every hole.

In that blasted ground two nectarine trees are planted in twelve inches of soil, with trunks about six inches thick and about fifteen feet high, and good and wide. I had three lug boxes of nectarines to the tree, big in size and good in flavor. My cherry trees run all the way from two and a half to three and a half inches around the trunk, twelve to fifteen feet high, except one of the same age is smaller than the others. I had a heavy crop off those cherry trees. I had a heavy crop off my apple trees. All the rest was a light crop. What was on the trees was good fruit, but I cannot call it a heavy crop. The trees are only four years old and I only sprayed them once, and naturally last spring they did not bloom heavy enough.

My family orchard looks to be in very good condition. I have no dead trees there. I had three in 1927 when we had the general sour sap condition going through the country. I replanted those, which are doing well.

I have twenty-eight acres of vineyards, where the

(Testimony of Lambert Hagel.)

soil is from twenty-six to thirty-two inches deep. I did not plant the vines on blasted ground. The oldest of my vines are about three and a half years old. They are from cuttings. The vines have made a wonderful growth on that shallow hard-pan ground. That soil is apparently good for the growing of grape-vines and fruit-trees. [67] My vines are all in a healthy condition with good growth. I still have a crop on them. Last year they were two and a half years old and I took off between four and six tons from nine acres. This year I have sold five and a half tons so far, and there are about four and a half acres to pick yet. I am figuring on another four or five tons off them. They are young vines and have not reached their full bearing capacity. I did not prune them for a crop last spring.

I raise all the greens and vegetables out there that we need. They grow well on that ground. I consider that soil in its condition adapted to the raising of fruit and vines.

I am acquainted with the Stern property. I know Mr. Stern well. I pass that property quite frequently. I have seen his orchard many times. Mr. Stern's orchard was doing very good the first two years, but since the sour sap condition went through the country and these trials started he neglected it all the time. He plowed it in the spring and disced it, but as a rule out of time; that is, when the moisture is all gone. He did it too late. I cannot see that Mr. Stern is taking any care of

(Testimony of Lambert Hagel.)

his orchard since he has been interested in this litigation. It looks neglected.

This is a picture of a grape-vine on my property. That is in what I call the commercial vineyard.

(The pictures were offered in evidence as Defendant's Exhibit 6.)

Beside fruit growing and grape growing I am engaged in the poultry business. I have four hundred chickens. I have been only three years in the poultry business.

Cross-examination.

I moved on this place in 1923. The family orchard was [68] planted in 1924 and I have cared for it ever since. It has only fifty-eight trees. I planted part of the vineyard in 1924. From nine acres I sold four to six tons in 1927. I sold it to different persons that came to my place. I cannot name the persons. They were strangers to me. I did not weigh the grapes. We took the lug boxes. They weigh, as a rule, about forty-five or fifty pounds. In 1927 I had six or seven lug boxes of my own. These people always bring their own boxes, and I dump them into them.

There are no missing places in my orchard. There are no places where the trees have died. I never sold any fruit from my place, except the grapes.

I recall being present on the first Monday in December, 1927, at Mr. John V. Kral's place. At that time I told him to plant grapes on his place. I did not give him as a reason for it that it was useless

(Testimony of Lambert Hagel.)

for Mr. Kral to plant tree fruit on that shallow hard-pan land. I did not say anything of the kind. I did not, in substance, at that time and place say that shallow hard-pan land such as was in Rio Linda was not fit for tree fruit. I did not boast at that time that I had not bought of this company, and that the company had cheated all the people that bought from them.

Q. Do you recall being present at Mr. Kral's house in the month of November, 1927, when there were present Mr. and Mrs. Perra, Mr. and Mrs. Klein, and Mr. and Mrs. Kral, and did you not, at that time and place, in response to a question from Mrs. Perra, state that the Rio Linda land was too shallow for tree fruit raising?

A. I didn't say nothing of the kind.

Q. Did you not state, in substance, that fact?

A. No.

Q. Did you not state that it was foolish to plant tree fruit there and expect it to grow?

A. Nothing of the kind. [69]

TESTIMONY OF JOHN POSEHN, FOR DEFENDANT.

JOHN POSEHN, a witness for defendant, testified:

I live out in the Rio Linda district, where I have ten acres of land, and will have lived there five years on the 19th of November. My son Robert owns a place adjoining me on the west. He has five acres, and has lived there about the same time.

(Testimony of John Posehn.)

I planted forty fruit-trees on my place in a family orchard in a number of different varieties. Robert has some fruit-trees on his place in a family orchard. I planted it myself. The fruit-trees are planted on hard-pan lands. The soil is half a foot, a foot and two feet deep. I blasted for all my trees. The soil on Robert's place is about the same depth. He blasted for his trees. I find that in the blasted holes there is good drainage. The water goes through. My fruit-trees have made a very good growth. I have some trees I measured this morning. They are twelve feet high, sixteen feet wide, and about sixteen inches around above the ground. I measured a fig trees this morning, twenty inches around above the ground, twelve feet high, and there are lots of figs on it. A good crop of figs this year. Those trees were planted in 1924. We had all the fruit we need from the trees in our family orchard, and there is some on them yet.

I think that ground is all right for fruit when it is blasted. It grows fruit well.

I have four hundred grape-vines. I did not blast for my grape-vines. The soil is just about the same depth. The vines have made a very good growth. I had one Thompson Seedless, sixty pounds, and next to that forty-five pounds, and from one of the Malaga vines I got forty-one pounds. They are very sweet. The sugar content is twenty-two per cent. The vines bear well all through the vineyard. [70]

I have some grapes that I have brought in. That

(Testimony of John Poschn.)

is the Emperor Variety, without water. I have some I put water on. They are bigger, but not so sweet as these.

Q. Does that ground out there seem to you to be good for grapes?

A. I planted about six acres more this winter.

WITNESS.—My son Robert has some trees and vines on his place. They have made a good growth. He has some ornamental trees, just the same as around this building. There is one thirty feet high, and it is thirty inches round above the ground. I planted those trees myself in 1924. His ornamental trees and his fruit-trees have all made a good growth, and he had a good crop from his trees and also from his vines.

This is a picture of Robert's place. There is that tree right there that is thirty feet high and thirty inches above the ground.

This is a picture of my place and my vineyard.

(The pictures were offered in evidence as Defendant's Exhibit 7.)

Cross-examination.

A couple of my trees died in 1927. I blasted for those trees, and water gathered there. It was my fault. There was too much water from rain. I don't know if the water gathered in the potholes caused by blasting. It might be.

I dug a well pit on my place. The top soil there is two feet deep and underneath that two inches of hard-pan.

(Testimony of John Posehn.)

Q. And from there on there was twelve feet of hard-pan, wasn't there? [71]

A. No, that is not hard-pan.

Q. But it is just as hard as hard-pan, isn't it?

A. Oh, no, you can pick it.

Q. But you didn't pick it, did you?

A. When you want to make headway you have to use dynamite to hurry up.

Q. In order to get it so that you could make any headway at all you had to use dynamite, did you?

A. Yes.

Q. And you used dynamite all the way down, did you? A. Yes.

Q. This well pit of yours, you did not have to cement that pit, did you? A. No.

Q. That soil, or whatever you call it underneath it, that little, thin hard-pan, that is plenty hard for the side of the well, isn't it?

A. But I have good water there, better than anywhere in Sacramento.

WITNESS.—I sold ten hundred seventy pounds of grapes from my place this fall. I have given some away. There is more there I can sell if somebody comes to buy it. Ten hundred seventy-two pounds is all I have sold this year.

I do not patronize the fruit and vegetable man that has a business out there.

Redirect Examination.

I have lots of grapes on my place beside those I have sold. I have given away a lot. Robert spread the stuff that came out of the well pit on the ground

(Testimony of John Poselm.)

and he raises all the vegetables on that that he wants. That is good ground. When spread on the ground it will break up and crumble. There is nothing left. It is all just like the top soil. My son planted his vegetables on it. What came out of my well pit I put that on the road, but this that came [72] out of Robert's well pit he put that on the ground and grew vegetables on it.

Recross-examination.

I put that on the road to fill up a low place.

TESTIMONY OF F. E. UNSWORTH, FOR DEFENDANT.

F. E. UNSWORTH, a witness for defendant, testified:

I live in the Rio Linda district. My place is on the highway this side of the Rio Linda town site. I bought that place last October, a year ago. At that time it was improved. It had been planted to fruit-trees. I have five acres, about three and a half acres of fruit-trees. It is planted mostly to Tuscan peaches. A portion of my orchard is planted on less than five feet of soil. The shallowest, I believe, was thirty inches. It runs from that to four feet, or a little better. I understand my fruit-trees are about eight years old. I have had a crop from them. Their appearance as to size and health and general condition is very good. They have a good leafage. They are not stunted at all. I had a very good crop this year of Tuscan peaches. I got five

(Testimony of F. E. Unsworth.)

lug boxes on one tree. The average weight of a lug box is from about forty to forty-five pounds. Throughout the orchard the average was about three lug boxes to a tree. I sold about a hundred dollars worth altogether. There was a tremendous lot of peaches left on the place in addition to those I sold. The reason I didn't sell more was, there was no market.

I am not an easterner. I was not an eastern purchaser of this land. I have been in California since 1889, and have been in Sacramento County for about thirty years. [73]

I consider that the soil there around my place is adapted to the commercial raising of fruit. My vines grow very good. This is a picture of my place.

(The picture was offered in evidence as Defendant's Exhibit 8.)

Cross-examination.

I am a meat-cutter by occupation, and never had any experience in orcharding prior to October, 1927. Since that time I have been out in Rio Linda, and have sold about a hundred dollars worth of fruit off my place. There was that much more on the place that I could not sell because of market conditions. I have not been following my occupation as a meat-cutter since coming to Rio Linda.

TESTIMONY OF H. F. BREMER, FOR DEFENDANT.

H. F. BREMER, a witness for defendant, testified:

I live in the Rio Linda colony. I first purchased a piece of ground there in 1922. Then I bought eleven and a fraction acres. I came from St. Paul, Minnesota, where I was in the grain business. I bought this first piece of land in 1922. I came out here the same year. I engaged in the poultry business.

I planted a family orchard of fifty trees in a general variety on my parcel of land. Where I planted my orchard the depth of soil was about two and a half feet, some of it less, and some of it a little more. We did not blast for the trees at the time we planted. After they were planted the ground got dry and we blasted at the side of the trees. After blasting in that manner we found there was ample drainage for the trees. That took care of the surplus water and let it go down. I don't know how many sticks of [74] powder were used. I don't know anything about blasting, and hired it done. That orchard has made a pretty good growth. The trees were healthy and flourished.

After about two years I sold that place. A couple of years ago I purchased another place out there, about half a mile east of the first place I owned. I am now engaged in the poultry business. I have twenty-five hundred laying hens and some

(Testimony of H. F. Bremer.)

baby chicks. I have planted a few fruit-trees for family use on this place. I did not blast for them. They are growing well so far.

I have had occasion to pass by and see the land that I formerly owned, and have observed the fruit-trees that I planted every time I go by the place. Their present condition is very good. They have made a good growth. I am familiar with the fruit-trees I see around the district. Those appear to have made a consistent satisfactory growth in comparison with fruit-trees of that age, quality and kind. I have seen some fruit off the trees. They have made a good production. In my estimation they bear very well. The quality and size of the fruit is good.

This is a picture of the place I formerly owned, and some of the fruit-trees that I planted there.

(The picture was offered in evidence as Defendant's Exhibit 9.)

Cross-examination.

I had no experience prior to 1922 in raising fruit. It was in that year I planted the first orchard. I cared for that about a year. In 1926 I planted twelve more trees. That is my whole experience. I have never sold any fruit. [75]

TESTIMONY OF JAMES GEDDES, FOR DEFENDANT.

JAMES GEDDES, a witness for defendant, testified:

I live in Sacramento, and have lived here for thirty years. I am familiar with the farming territory around Sacramento and have been interested in real estate to some considerable extent, and have bought and sold lands throughout the County. I know the territory that was formerly known as the Haggin Grant, or the Rancho Del Paso, before it was subdivided and sold in small parcels. I have known the territory known as Rio Linda since 1912, the time that it was first carved from the original grant, and have watched it develop. I have bought and sold land in Rio Linda. I know the property involved in this action, the Lindquist property, described as Lot Number Nineteen of Vineland. I have looked it over. In 1921 the reasonable value of that parcel of land during the month of September was about three hundred fifty dollars an acre.

I know what the people are doing generally throughout the colony. The principal industry at the present time, and for the past few years, has been the poultry industry. I have seen fruit-trees growing here and there around the colony, and about the location of this particular tract. I know the character and quality of the soil in the neighborhood. It is demonstrated by stuff growing there at the present time.

(Testimony of James Geddes.)

As to this particular lot, I would hardly consider the land adapted to the commercial raising of fruit on ten acres. Ten acres is not big enough for a commercial orchard, but the ground itself does produce fruit commercially. There are orchards all through the district that show that.

I have had something to do with the fruit business and dealing with fruit lands in Sacramento County and in Yolo. I have [76] owned orchards in Yolo County for thirty-five years. I was outside man for the Southern California Canneries, which is now a part of the California Packing Corporation, and have bought fruit all over the country. In that capacity I was required to examine orchards and observe their productivity. I have also seen and noticed the orchards around through the Rio Linda district, and have noted the growth of fruit-trees and the condition and quality of the soil. In my opinion, that land is adapted to the commercial raising of fruit.

Cross-examination.

I am engaged in the business of buying land now, when I see something that suits me. I am not a speculator in land. I try to play a safe game in buying land. I have been interested in recent times in the purchase of a million dollars worth of land near Folsom. I am personally interested in that. I have put up my own capital with the Capital Dredging Company. That corporation is located in Boston. There is no agent or repre-

(Testimony of James Geddes.)

sentative of that corporation in Sacramento. I did not deal with any person in connection with the Capital Dredging Company. I bought the property and held it in my own name, and then we formed the company and I merged the lands into the company. We formed a corporation for the purpose of dredging those lands for gold. I am not a promoter of that corporation, I am not a member of the board of directors. I have some stock in the corporation and helped form it.

The reason I appraise this land at three hundred fifty dollars when I appraised the other Lindquist place at three hundred twenty-five dollars an acre, is that the other people had a little draw through their land and it would probably cost twenty-five or thirty or forty dollars per acre to level it up and put it in shape. This is a better piece of ground. It is closer to the road, [77] it is better lying. It is closer to Rio Linda. I think it is a better piece of property. The other is further away.

I don't think there was any electric power there in 1921. I think it has been put in since. There were power lines through there, but there was some trouble about 1921 or 1920 in getting the distribution of power. The power companies were not willing to extend their lines.

I have never heard that that land was sold in 1910 or 1911 for twelve dollars and a half an acre. I know George P. Robinson, the real estate dealer here. He never owned any land there. He never acted as agent for the sale of land there. He and

(Testimony of James Geddes.)

Morris Brooks were mixed up in trying to get the original deal, and I know the 45,000 acres was sold for about fifty dollars an acre. There was no $12.50 an acre land there. Nobody could find anything like that. I heard that stuff before, but I could never find it. George P. Robinson never was trying to sell that land at $12.50 an acre. The land was sold as a whole. The Haggin people would not talk sale unless it was sold as a whole. It took a great deal of money to make that deal.

Q. I am asking you now whether George P. Robinson had a part of the Rio Linda section for sale at $12.50 an acre.

A. Oh, he may have away out beyond the Strauch lands. Rio Linda is within the grant, and the grant was to be sold as a whole, the entire 44,600 acres had to be sold as a whole.

Q. The Strauch lands are within this section, aren't they?

A. No, they are out beyond Rio Linda.

Q. Aren't there some of the Strauch lands within that section? A. No. [78]

TESTIMONY OF LOUIS TERKELSON, FOR DEFENDANT.

LOUIS TERKELSON, a witness for defendant, testified:

I live in Rio Linda upon the highway this side of the town site of Rio Linda. Before coming there I lived in Southern California. I had been engaged in the fruit business. I have been engaged in that

(Testimony of Louis Terkelson.)

business over thirty years. I have lived in California around thirty or thirty-five years.

I made my purchase of land in Rio Linda about fifteen years ago. I have forty acres. Twenty-eight acres is planted to fruit. I have no other business except the commercial raising of fruit, and have been engaged in the raising of fruit commercially ever since I moved to Rio Linda. I have in my orchard about three and a half acres of Bartlett pears. Some of those trees are planted on soil less than five feet in depth, and some on soil as shallow as three feet or three and a half feet. The trees on that shallow ground there are about thirteen years old. They are still alive and growing. As to my Bartlett pear trees, on this upland shallow soil I do not have much trouble with blight. I do not have as much trouble with blight on shallow ground as they do on river bottom land. My trees have given a good, healthy normal crop. From my Bartlett pears I have had a good crop. It varies. Some years are better than others. I had a very heavy crop in 1926. It was not so heavy this year. It was rainy in the blooming season and the bees could not work to pollenize the blooms, and so they did not set. There was nothing in connection with the soil, its depth or condition or quality, that in any way interferes with the growing of fruit on the ranch.

I have something like twenty or twenty-five acres of almonds, which is my principal orchard. The almond trees are about thirteen or fourteen years

(Testimony of Louis Terkelson.)

old. I planted them myself when I [79] moved there. They have made a good growth. Some of those trees are planted on soil less than five feet in depth, some as shallow as three feet or three and a half feet. The trees grow well on that soil, and have produced almonds. They have made a good growth and have produced good crops. I believe that soil is adapted to the commercial raising of almonds, where it is as shallow as three and three and a half and less than five feet. My production has proved that to me.

I know the Unsworth place. I know that orchard and what it has produced. He had a good crop off his peach trees, but no market. The crop was good last year and the year before. It has borne good crops right along. I have known that orchard since it was set out. It was blasted in the center of the tree rows. He gets sufficient drainage where his orchard was blasted. The water goes through the hard-pan. It looks like it.

This is a picture of my almond orchard. The trees show without leaves because in the fall when we harvest the almond crop we use long poles and knock them off on sheets, and the leaves come down with the fruit.

(The picture was offered in evidence as Defendant's Exhibit 10.)

Cross-examination.

I don't know where the land involved in this action lies. I don't know the property.

(Testimony of Louis Terkelson.)

The average depth of soil on my place is around four or five feet. I think that the average is four feet, or five, I couldn't tell exactly. Heretofore I have always estimated it at five feet. [80]

TESTIMONY OF H. L. WANZER, FOR DEFENDANT.

H. L. WANZER, a witness for defendant, testified:

I am employed by the Capital Building and Loan Association of this city. I own a piece of property in the Arcade district, lying about a mile to the southeast of the Rio Linda Subdivision. I have owned that property since 1922. I have thirty acres there. The parcel I own is on the upland, that is, the highland. All of it is planted to fruit. The land is underlaid with hard-pan. In planting my trees I blasted through. The depth of soil above the hard-pan runs from three feet to six feet. I have a considerable area less than five feet in depth.

I have apricots and canning peaches planted there. I planted the trees in blasted holes. They are growing successfully. I have had no loss of trees due to insufficient drainage.

The trees were planted in the spring of 1922. They have made as good a growth as any trees in the country around there. I am satisfied with the growth.

My trees have produced very well. The first crop I got was two years ago. It was over a hun-

(Testimony of H. L. Wanzer.)

dred tons off twenty-five acres of peaches. That would be four tons to the acre. I thought that was a good production considering the age of the trees. It is satisfactory to me as a fair average production.

My apricot trees have produced in about the same proportion. The hundred tons that I speak of was not this year's crop. I had as much fruit this year, but on account of the peach market and the way the canners are treating the growers I could not dispose of as many of them. When I spoke of a hundred tons I meant that I actually marketed a hundred tons. At that time part of the crop remained on the trees, due to marketing conditions. This year my production was a little better on account of the age of the [81] trees, but the marketing conditions did not permit me to sell as many. The canners established a stiffer grade and would not accept peaches with any defects in them whatever.

That land raises excellent fruit.

I am familiar with the district known as Rio Linda. I was with the original company that purchased the entire Haggin Grant for quite a number of years, and during that time I had occasion to go through all of these lands.

Q. Considering the character, soil, and the depth of the soil, and its quality in the Rio Linda District, is there any reason you know of why that district will not produce fruit in commercial quantities, as well as the district to the south? Putting it an-

(Testimony of H. L. Wanzer.)

other way, do you believe that the land in Rio Linda is adapted to the commercial raising of fruit?

A. Not as well as on the easterly side of the Rancho Del Paso, on account of a slighter elevation, and more drainage.

Q. Aside from that, taking the soil, and the depth of the soil, and considering that the drainage might be provided for by blasting, then would you consider that the Rio Linda lands are adapted to the commercial raising of fruit? A. Yes.

Q. Not comparatively in connection with other sections, but standing by itself, you think it would, do you?

A. If there was a sufficient amount of blasting to make up for the drainage that the other country has on account of the uneven contour, conditions would be equal.

Q. Blasting in any particular section has to be done, if properly done, in accordance with the contour and the hard-pan in the particular section; is that not true? A. Yes.

Mr. BUTLER.—You may cross-examine. [82]

Cross-examination.

Mr. LEWIS.—Q. You do not consider hard-pan injures the soil sufficiently for fruit raising, do you?

A. I would not buy it for that, no, sir.

Q. You do not think it would be particularly adaptable to raising fruit?

A. Fruit could be raised on it, if it were blasted sufficiently.

(Testimony of H. L. Wanzer.)

Q. You mean if you used an excessive amount of dynamite, or dredged it, or something of that kind, do you?

A. If you used a sufficient amount of dynamite.

Q. It would take a good deal of it, wouldn't it, to get through that crust out there?

A. Dynamite is cheap.

Q. It would take a lot of dynamite, would it not?

A. Not so much, no.

Q. You used to be connected with this company, did you not? A. Yes.

TESTIMONY OF WALTON HOLMES, FOR DEFENDANT.

WALTON HOLMES, a witness for defendant, testified:

I owned some property in the Arcade district up to February of this year. I had owned that property for six years. I had twenty acres there. It was planted to canning peaches and apricots.

There was a hard-pan underlying the top surface. The depth of soil throughout the orchard varied from eighteen inches to six feet or so. It was all upland. It bordered on a creek. Away from the creek bottom the soil was from eighteen inches to perhaps four or five feet in depth. A considerable quantity of the [83] soil was less than five feet in depth. I blasted for the trees and found that blasting provides ample drainage. I think my trees made a little better growth an average on the blasted ground in the hard-pan land.

(Testimony of Walton Holmes.)

I had a crop from the orchard. In 1926, the first year, I delivered eighty-three tons from twelve acres of peaches. They were four years old then. I would say that was a good production considering the age of the trees. That year there was no ungraded fruit left on the trees. The market absorbed nearly all of it.

I consider that land adapted to the commercial raising of fruit.

Cross-examination.

I am vice-president of the Capital National Bank. I have been in that occupation for twenty-one years. I am not a fruit raiser outside of this adventure. That was not an unprofitable adventure. I did not lose any money. So far as fruit was concerned, I broke even on that. The fruit adventure has been very unprofitable the last two years, in raising canning peaches, on account of the marketing conditions. The first year was profitable.

I consider that soil eighteen inches in depth is adapted to the raising of deciduous fruits commercially because my practical experience prompts me to form that opinion. All I have to go on is my actual experience in that one adventure.

My land is well drained. It is rather sloping. It has a creek at the back end of it. Some of that land has no hard-pan in it at all.

Q. So that the very little that was eighteen inches in depth would not compare with the land that was deeper: Is that not true? [84]

A. It had drainage, it had a slope to it.

(Testimony of Walton Holmes.)

Q. And the underlying hard-pan sloped off, also, did it not, so that the water would run off?

A. I don't know how the hard-pan sloped. I could not see the hard-pan.

Q. And you did not check up the hard-pan, did you?

A. We blasted it. I could not tell the slope of it.

Redirect Examination.

Mr. BUTLER.—Q. The land where you did not have hard-pan, or where you did not find the hard-pan, was on the creek bottom land, wasn't it?

A. Yes.

TESTIMONY OF E. E. AMBLAD, FOR DEFENDANT.

E. E. AMBLAD, a witness for defendant, testified:

In September, 1921, I was the sales manager of the Sacramento Suburban Fruit Lands Company, and I was acting in that capacity for quite some time. I have not been in the company's employ for a number of months now.

I met and had dealings with Mr. Lindquist and other members of his family leading up to this contract dated the 29th of September, 1921. That evening was the first time I called on and met Mr. H. A. Lindquist. I had never before met him or discussed with him the purchase of land in Rio Linda. Several of their friends had purchased land out here at Rio Linda, and Mrs. Lindquist had been

(Testimony of E. E. Amblad.)

talking with Mrs. Anderson, and through her I met these people and arranged for an appointment two or three evenings later, and I went over in the evening and spent two or three hours there. When I called there Mrs. Anderson was in for a little while and the two brothers and their wives. At that [85] time they told me that they had been discussing Rio Linda with some of their neighbors. They seemed to be familiar with the project and with the literature that I had.

No conversation took place between me and Mr. H. A. Lindquist regarding the commercial raising of fruit. I did not tell him that the Rio Linda Colony, or particularly this Lot Number Nineteen of Vineland, or any lot in Vineland, was specially adapted to the commercial raising of fruit. Fruit was discussed between me and Mr. H. A. Lindquist that evening. We talked about a family orchard. We did not discuss the question of fruit to be raised commercially. I did not tell Mr. H. A. Lindquist, or any of the other people there, in his presence, that the plan for them in coming out here was to start in with the chicken business and to plant a commercial orchard, and to carry on their chicken business for a living until their commercial orchard came into bearing.

The principal topic of conversation with respect to their business that they intended to engage in was poultry. Leading up to it Mr. Lindquist told me his health was poor; that his doctor had advised a trip to the old country, which he had made a year

(Testimony of E. E. Amblad.)

or two previous to that, and on his return to Minneapolis his old trouble returned and he was advised to change climate. At that time his friends had all gone out there. There were half a dozen families from that neighborhood that were making up a little colony to move out here, and four or five of them had already purchased. That seemed to work in with his plan for a change of climate, and they decided to go along. We talked principally about the poultry industry as it is conducted here in Rio Linda. [86]

I described to him the operations of the poultry association and the cost of being a member and the way he would obtain his feed as a member, the marketing of their eggs, and the advice and assistance he would get.

At the time this Lot Nineteen was discussed there was on it a poultry-house and a well. I was uncertain about the size of the poultry-house, and told him it was about four sections, but it was a little short of that and the company made it good after he arrived here. Outside of the poultry equipment there was just a well drilled there.

He did not inquire of me at that time about the expense of planting an orchard, or the character of the trees to plant, or the expense of maintaining an orchard. I only told him about planting of a family orchard such as all the people planted at Rio Linda, and that they did it to beautify the place and to help the family, and that the adviser here would tell them after they arrived how to

(Testimony of E. E. Amblad.)

plant it and how to care for it, pruning, irrigating and all that.

I had been out to California quite a number of times. I had been out the previous winter, a few months before. At that time there were about a dozen families residing in the Vineland Subdivision.

Cross-examination.

They were not on the adjoining land. There were about a dozen families within a radius of a quarter to half a mile. Most of them had been there two or three years. The last trip I made before talking to these people was in April, I think.

I was the sales manager of this concern. I heard of these people through Mrs. Anderson, and Mrs. Peterson and Mrs. Carlson. [87] I went to see them. I had a booklet in my possession, an album with pictures in it, an assortment of pictures I had taken at the various times I had been out there.

I discussed how much land these people were buying in that case. They indicated they wanted to buy the same that the other friends had bought, who had all bought ten acres apiece. I had no conversation with them about planting other things than a family orchard. Nothing was said about utilizing the remainder of the tract. There was no discussion about the well on the place. I did not know much about the well, except I had a letter from our Sacramento office that this place was partly improved with a well and a poultry-house. I may

(Testimony of E. E. Amblad.)

have told them that the well on the place was sufficient to irrigate the whole ten acres. The well had been put there by the previous owner, with the idea of irrigating the whole ten acres, and he could do it if he wished. I don't remember whether I told the Lindquists they could irrigate the whole of the ten acres from that well. I am not positive about that. I wrote that there. There was a question as to whether the poultry-house and the well were in good condition. I did not know. I told them I would guarantee it would be in good condition and it was put in there for that reason. I meant just what I said, that it had on it a chicken-house of the Lyding house, together with a well of sufficient size to irrigate the tract. I didn't mean that the Lindquists were to irrigate the entire tract. They didn't talk about anything of the kind. They didn't talk about any commercial orchard. It was just simply to make the statement that we would put the well and the poultry-house in good condition.

It would take more than two acres to put up a living-house and a chicken-house and a family orchard. When you have [88] twenty-five hundred chickens or three or four thousand chickens it would take more than that. It would take ten acres with a family orchard. I know of a place where there are only twenty-five hundred chickens, where they use the whole ten acres. That is Mr. Bremer's place. I think he uses the entire tract for chickens, and he has a family orchard on his

(Testimony of E. E. Amblad.)

place. I imagine the chicken-yard covers the whole place.

I did not tell these people that this land was specially adapted to raising deciduous fruit. I told them it would raise certain kinds of fruit, but they would have to consult our horticultural adviser when he selected his family orchard as to what would be the best to put in there. I did not tell him it was specially adapted to the raising of all deciduous fruits commercially. We discussed the booklet and read it through that evening.

Redirect Examination.

Q. Did you discuss the poultry features of the book that evening?

A. Yes, that was the principal topic.

TESTIMONY OF ARTHUR MORLEY, FOR DEFENDANT.

ARTHUR MORLEY, a witness for defendant, testified:

I live in the Arcade district, south of Rio Linda, about a mile from the south line of Rio Linda. My place is on the upland. I own about seventeen acres. I have owned it about eight years. At the time I bought the property it was improved. There was no house on it, but the trees were planted.

The depth of soil is about a foot and a half to three feet. It was blasted. I found that there is ample drainage for the trees by reason of the blast-

(Testimony of Arthur Morley.)

ing. I have mostly plums. I have had a crop off my trees every year since I have been there. They bear [89] very well. The trees are in a good healthy condition, with a very satisfactory growth. I have been in the fruit business about sixteen or seventeen years. I have had experience on both river bottom lands and uplands. I am familiar with fruit growing on river bottoms, as well as on the uplands. Nearly all of shipping varieties of plums, peaches and apricots is grown on the uplands. It has a better carrying quality. They are firmer. They usually demand a better price for that reason. They have a better sugar content.

I am familiar with the peach growing district around Auburn, Newcastle and Penryn. That is a fruit shipping district. It is practically all shallow soil. A good deal of it is granite.

I am familiar with the fruit growing district around Oroville. That is a hard-pan district. They usually blast for the trees there. Commercially on that soil they raise quite a lot of olives and oranges. The Oroville olives and oranges are very good. They are both raised on shallow hard-pan land. They blast.

I have been over some of the peach growing districts back from the river bottom in the Sutter County area. They raise peaches on hard-pan ground in Sutter County successfully and commercially.

I have been around through the Rio Linda district to some considerable extent. I put in thirty

(Testimony of Arthur Morley.)

days or more there in the employ of the Company in looking over the agricultural situation.

Q. Did you make a count of the fruit-trees and the vines growing in the district while you were making this survey? A. Yes.

Q. Give us the figures, please.

A. We found there were almonds 18,720; olives 9,370; peaches 7,060; plums 2,950; pears 8,875; prunes 6,040; figs 10,230; apricots 1,550; walnuts 490; cherries 9,465; apples 600; persimmons 100, making a [90] total of 83,650.

Q. That did not include the family orchards, did it?

A. No. We estimated about 325 family orchards, 25 trees to the orchard.

Q. Which makes a total of 8,100 more?

A. Yes.

Q. What is the grand total of trees?

A. Trees, 91,750.

Q. And the total number of vines in the district?

A. About 100,900.

WITNESS.—As a practical orchardist I do not know any rule which requires a minimum of five feet of soil as necessary for the successful growing of fruit-trees commercially. I have been associated with practical orchardists for some time, and I never heard of such a rule mentioned or discussed. In my opinion, it is not necessary that five feet of soil be present in order to successfully grow fruit. Everything from here to Fair Oaks is on practically less than five feet of soil. Fair Oaks and Car-

(Testimony of Arthur Morley.)

michael, and Florin among the grapes, that is shallow soil. Florin is generally recognized as a grape growing district, celebrated for its table grapes, one of the best in the state for table varieties. In my opinion I think the soil, considering its depth and character of the hard-pan when blasted, is adapted to the commercial raising of fruit.

With respect to the orchards throughout Rio Linda we found some very nice orchards, and some that looked as though they had been neglected. They were not doing so well. When I found an orchard that had been cared for, properly cultivated and irrigated, I found the condition of the trees and crops to be good. In my opinion, the growing of fruit in Rio Linda is dependent upon care more than upon soil. [91]

We made an investigation to determine whether root growth would penetrate into hard-pan where blasted. We dug beside some olive trees and a plum tree. In respect to the plum tree we dug down about four feet and found the roots were extending into the substrata, and as to olive trees, the same. We made an excavation about four or five feet deep by the olive trees, and we found the roots going down to the ground that far. We did not get to the end of the roots. They were running sidewise into the hard strata.

I have had experience with blasting in that district. Where the ground is blasted and the hard-pan and subsoil there thrown up and exposed to

(Testimony of Arthur Morley.)

the air, it slacks. In twelve months afterwards I would not notice any of it, except the hardest, about one inch. You would probably find that everything else would be slacked.

I found the general thickness of the hard-pan stratum to be usually from one inch to two inches or something like that. I made excavations at Rio Linda to determine the thickness of the hard-pan and I found that to be true of the Rio Linda district. Underneath the hard-pan we found a softer substance.

The samples shown me, Plaintiffs' Exhibit "B," corresponds pretty generally with the top layer of hard-pan I have just mentioned. I found that to be just a few inches thick. It is very seldom you get it as thick as that. If that is broken the strata underneath it will allow the penetration of moisture. When that substrata is first exposed it is pretty hard when it is dry. When you wet it it will soften. It will not cement itself after it is wet. I think that substratum and hard-pan, when disintegrated, will support plant life. I have seen vegetation and trees growing in it. It is usually scattered around the lawn and gardens and everything grows nicely on it. [92]

I have seen these pictures of the excavation made by the olive trees. You can see the roots going down through there.

(The pictures were offered in evidence as Defendant's Exhibit 11.)

There was an olive tree growing where this ex-

(Testimony of Arthur Morley.)

cavation was made. It had been blasted. There was twelve inches of soil on top of the hard-pan.

Cross-examination.

I know the place where I took these pictures. I believe it is owned by a man named Smith. Mr. Smith was not working the place at the time. As to the condition of fruit in that orchard, there was a very light crop of olives. All over the district this year there was a light crop of olives. I did not make any investigation to determine whether that orchard was commercial profitably. I have testified about that orchard repeatedly since these cases started last month, and I have been repeatedly asked whether that orchard was commercially profitable. I have not gone out and made any investigation of that since these cases started. I was not interested in finding that out.

Q. Why did you pick out an olive tree to make these experiments?

A. We knew that those trees had been blasted, and we wanted to see what the effect of the blasting was.

Q. And you also knew that olive tree roots would penetrate a lot of places where the roots of other trees would not, didn't you?

A. No. All trees would act about the same.

Q. Were the feeding roots down in the hard-pan?

A. Most of the feeding roots were on the surface. The little feeding roots came out all the way.

[93]

(Testimony of Arthur Morley.)

Q. Feeding roots are in the first three feet, are they not?

A. Not very much; they are nearly all on top.

WITNESS.—I dug that excavation about four or five feet deep. I took a census of the trees in the Rio Linda district and spent about thirty days out in the district. Mr. Jarvis was with me. That is Mr. O. W. Jarvis. He used to be a Farm Adviser around here. He had a lot of experience as an agricultural expert. He was also in the special employ of the defendant company at that time. We went around and made an estimate of the trees in which we included the trees on the Stern place and the Tipper trees and the Haenggi trees. We found a lot of deeper soil of eighteen inches or two feet over in what they call the "Island" and in the creek bottoms and on the uplands too.

Q. The better kept trees were down in that island district, were they not?

A. We found a lot of trees growing nicely up on the uplands.

Q. Will you answer my question? The better kept trees were down in that island district, were they not?

A. There are a good many of them, yes.

Q. They were well taken care of?

A. Those trees were well taken care of.

Q. And those trees that did not show signs of care were all on shallow hard-pan land?

A. Some of them were, yes.

Q. Practically all of them were?

(Testimony of Arthur Morley.)

A. A good many of them were.

Q. Your principal business is caring for orchards for other people, is it not? [94]

A. No, that is part of my work.

Q. Do you derive your living from the seventeen acres you farm, or from the other work that you do? A. Off the farm.

Q. Off your farm?

A. Partly from that. Orcharding work is seasonal, and I take a gang of men and superintend the pruning or the picking of crops.

Q. Which provides your principal income?

A. My orchard does.

Q. The other provides about half of it, doesn't it?

A. Yes, my spending money.

Redirect Examination.

Mr. BUTLER.—Q. The orchards in the bottom lands, or the island district, are practically all commercial orchards, are they not?

A. Yes.

Q. And the orchards you found on the uplands are practically all family orchards—smaller orchards?

A. Yes, most of them not coming into bearing yet.

Q. Young trees? A. Yes, young trees.

TESTIMONY OF F. E. TWINING, FOR DEFENDANT.

F. E. TWINING, a witness for defendant, testified:

I am an agricultural chemist. I live in Fresno.

(Testimony of F. E. Twining.)

I have lived in California for thirty years last spring. I have been engaged in that line of work for twenty-eight years. I maintain in Fresno a laboratory, known as the Twining Laboratory, which is the most complete commercial laboratory on the Pacific Coast. During the time I have been in business I have had occasion to examine a great many of the orchards and vineyards on the orchard and vineyard land up and down through the Sacramento and San Joaquin [95] Valleys and in Southern California and Arizona. In the Fresno district there are thousands of acres on the upland there with a hard-pan base such as we have in this part of the country. Part of that hard-pan land around Fresno was planted to orchards. They are raising orchards commercially and profitably on the Fresno district on hard-pan land of shallow depth. Where that land is very shallow it is customary to blast for the planting of orchards. Fresno ranks as one of the principal grape-growing districts of the state, raising principally raisins, and also table grapes. We find a considerable portion of the shallow hard-pan land devoted to grape culture.

It is not customary to blast for the planting of grape-vines. A good many vineyards are blasted, though, on very shallow land. I don't know of any rule among horticulturists prescribing a minimum limit of five feet of soil as necessary for the growing of fruit-trees.

There is one orchard of twelve thousand acres

(Testimony of F. E. Twining.)

in the Fresno district devoted to the raising of figs. It has been sold out a good deal, practically all to local people in Fresno. I was acquainted with the conditions there at the time that orchard was planted. That is a hard-pan land. As to the depth of soil throughout that orchard, the hard-pan is at the surface in places. It probably averages from one and a half to three feet, in some places a little deeper, but most of it very shallow. Practically all of it was blasted.

Q. With respect to the character of the hard-pan and the subsoil how does it compare with the hard-pan and subsoil in the Rio Linda district?

A. The hard-pan is a little harder. There is more iron in it and [96] therefore it is harder and tougher hard-pan, but the soil is the same type of soil.

WITNESS.—Soil of that character when blasted is adapted to the raising of fruit commercially.

I am familiar with the Florin district, which is given over mainly to table grapes. That is hard-pan land with shallow soil. A very fine quality of grapes is grown there.

I am familiar with the Oroville district. A good portion of the fruit raised in Oroville is on shallow land which has been blasted. Principally, they raise there olives, oranges, and some figs. The quality of the olives raised there is some of the best in California, and the oranges have the same high quality and early maturity. A good deal of the

(Testimony of F. E. Twining.)

peach-growing district of Sutter County is on hard-pan land.

Q. From your experience up and down through the Valleys of the State of California, is the presence of hard-pan detrimental to the growing of fruit?

A. The depth of the hard-pan must be taken into consideration.

Q. You mean the thickness of it?

A. The thickness and the general character of it. If it is very shallow, that is if the soil is shallow and the hard-pan near the surface, it should be broken up, but, depending on the method of irrigation, three feet of soil will grow most plants, three or three and a half feet.

Q. If you have a shallower soil than that, say a depth of twelve inches, eighteen inches or two feet, can you by blasting put that in shape where it is adapted to the commercial growing of fruit? [97]

A. Blasting and subsoiling in certain character of hard-pan, yes.

WITNESS.—The purpose of blasting and subsoiling is to open up the subsoil so that water will penetrate below to provide drainage and a certain area that will hold moisture. The detrimental character of shallow soil is its inability to hold moisture.

I am familiar with the Rio Linda district. The soil out there is capable of being prepared by blasting for the commercial raising of fruit. The cost of blasting will vary. I would estimate it from twenty to thirty dollars an acre.

(Testimony of F. E. Twining.)

I have made between three and four hundred tests and borings throughout the Rio Linda district. They have been over the entire district, on the upland. I have also made chemical tests of the soil scattered pretty well over the entire district. There is not a great difference in them. I have made a test of the chemical content of the soil on this particular Lot Nineteen of Vineland. The phosphoric acid total is .21, or 8,400 pounds per *acre*. The total potash is .98, or 39,200 pounds per acre-foot. The acid soluble portions, phosphoric acid .17, and potash .8. My analysis was also made at a three-foot depth. I found there phosphoric acid .17, potash .72.

Q. What is the volume or quantity of potash and phosphoric used by an acre of fruit in a year's time?

A. Phosphoric acid twenty-five to fifty pounds. Potash, fifty to a hundred.

WITNESS.—There is a sufficient quantity of phosphoric acid and potash in the soil on this land to last for the raising of fruit for [98] a good many years. There is no deficiency in the soil as far as those two elements are concerned.

Q. From your examination, chemically and otherwise, your tests and your borings, is that Lot Nineteen of Vineland adapted to the commercial raising of fruit if the ground be prepared by blasting?

A. Yes.

Q. Do you know of anything in the soil there that is detrimental to the raising of fruit? A. No.

WITNESS.—At the points that I bored the hard-

(Testimony of F. E. Twining.)

pan was about two to two and a half inches thick. Underneath that I found a strata of varying density, slightly sandy or with clay more or less hard, but softening readily when wet. Going down for the purpose of digging a pit, when you get through the hard-pan the underlying strata can be broken with a pick. It is easier to shoot it with dynamite and it works faster. If the underlying strata is subjected to water it will soften and provide drainage, and also provide moisture for the use of the plant.

This is a sample of the top stratum as I took it from that place. That is the hard-pan with the impervious layer on the surface. When I say impervious I mean it will not permit water to pass through. The water does not pass through the red portion there, but the balance will absorb water quite readily when exposed. If this is broken and thrown out on the surface and allowed to stand exposed to the air and rainfall, it will slack. Rain will soften it and it will break down. Any considerable pile of this will disintegrate in a year very readily when it gets wet and will form soil. There is nothing in the hard-pan below the impervious stratum that is detrimental to plant life. The chemical constituents of [99] this, and the subsoil, as compared to the top soil, are very similar. There is not a great difference.

Q. Here is a sample that has been introduced in evidence as Exhibit No. 5. Will you look at that

(Testimony of F. E. Twining.)

and state whether or not that is hard-pan, top layer, or subsoil? A. Yes.

Q. That is hard-pan.

A. Yes, that is hard-pan. You might say there are two hard-pans, although the chemical composition is very similar. One of them has more iron in it.

Q. That is this Exhibit 5 that I have here?

A. Yes.

Q. This layer of hard-pan, you found it in other places, did you? This iron-colored hard-pan?

A. Yes.

Q. Do you find the thickness of that stratum to be generally uniform?

A. It will vary from two to three inches. Usually the red is shallower than the white. I would say from an inch to two or three inches.

Q. And is that readily broken by blasting?

A. Yes.

Q. And when broken and thrown up will it provide drainage through the subsoil underneath?

A. Yes.

Q. Is there any reason that you know of why fruit cannot be grown successfully and commercially on that class of land under discussion here?

A. No.

Cross-examination.

I was not connected with the Faulkner fig orchard. I was not employed by that company to make tests. I was employed by a number of peo-

(Testimony of F. E. Twining.)

ple who had purchased land down there to make tests [100] upon the land. That was not a colonization scheme. It was subdivided and practically all of it was sold to Fresno people for the purpose of raising figs. My examination there was not carried on in connection with the sale of land.

I made an alkali survey of fifty thousand acres for the United States Farm Lands Company. They owned land located in Madera and Merced Counties, and were selling to anybody who wanted to buy land. You can call it a colonization scheme.

I have been in Oroville a good many times the last thirty years. I was up there about two months ago. I was not there in connection with some colonization scheme. I did not go there to make an investigation of colonization lands that were involved up there.

There is nothing in the soil in Rio Linda that is detrimental to the growth of orchards. The hard-pan in itself is not detriment except physically, because it interferes with irrigation if it is near the surface. The clay that lies over the hard-pan will soften up when wet. The density of the soil there is not detrimental to the raising of fruit. That is not the poorest land in Sacramento County. There are river bottom lands of some of the Redding series of gravels that are much poorer.

Q. You mean the river bottom land where there is alkali?

A. I would not necessarily pick out alkali. I would pick out certain sandy soils in the Redding

(Testimony of F. E. Twining.)

gravels. Lots of them are devoted to orcharding. They are not as good as the soil around Florin or Rio Linda.

WITNESS.—Heretofore I have told you that the land in Sacramento County that was the worst is down in the southeastern portion. That [101] is the Redding gravels. It is possible that I did not mention river bottom lands before, but I am mentioning it now. Some river bottom lands are worse than Rio Linda. I am talking about spots. I do not mean where there are bog holes and alkali.

Q. The depth of the soil is of great importance in selecting land for the planting of an orchard, is it not?

A. If a person has a deep soil they don't have to break up the hard-pan or do the blasting.

Q. Do you consider the depth of soil of great importance? A. Not necessarily.

Q. You do not consider that shallow soil is often a liability, do you?

A. No. I think that every shallow soil required some preparation.

Q. Do you consider they are often a liability?

A. I know where they are beneficial.

Q. I am asking you this question: Shallow soil is often a liability, is it not?

The COURT.—Well, what do you mean, Counsel? Make your question clear.

The WITNESS.—Yes, that is what I say, let me understand what you mean.

(Testimony of F. E. Twining.)

Mr. LEWIS.—I am asking him if he considers that it is a liability.

The COURT.—Make your question so that the jury will understand it and the Court will understand it. What do you mean by "liability"? In what respect?

Mr. LEWIS.—Q. Rather than being profitable, it would be a liability to a farmer, would it not?

A. No, sir. I knew of hundreds of acres where hard-pan is a benefit [102] to the soil.

Q. Wouldn't it make the ground cold and wet?

A. A heavy soil without any hard-pan might be cold and wet, just the same, or a sandy soil in which the water table was high.

Q. Would hard-pan soil be considered cold and wet? A. Not necessarily, no.

Q. Are you familiar with Farmers' Bulletin No. 1088, issued by the Department of Agriculture?

A. I don't remember it right now; I have it, because I have all of those bulletins.

Q. Do you consider this statement in there false:

> "The depth of soil is of great importance and is a matter to which attention should be given when the land is first examined."

Do you consider that statement false, or true?

A. That is a general statement.

Q. Is it false or true?

A. It is neither false nor absolutely true.

Q. What about this statement:

(Testimony of F. E. Twining.)

"Shallow soil is often a liability, and its utility is sharply limited for practically all farming purposes."

Is that false or true?

A. That is an exaggerated statement.

Q. And also this:

"It is cold and wet in the spring."

A. Is that false, or true? A. Not necessarily.

Q. And this:

"The water-table being kept close to the surface." [103]

A. If the hard-pan holds the water it does. When I speak of hard-pan I speak of it with proper preparation.

Q. And this:

"And later on dries out rapidly and becomes baked and hard."

Is that true or false? A. Heavy soil?

..*A.* I am speaking of shallow soil.

A. If there was sand on your hard-pan, there are soils in California where there is sand, and it would not bake, at all.

Q. Take the Rio Linda soil.

A. All of your Madera and San Joaquin sandy loams will bake if they are not properly cultivated after being wet.

Q. And this:

"Such soils are quickly affected by drought."

A. Shallow soil, yes.

Q. That is true in Rio Linda.

(Testimony of F. E. Twining.)

A. That is true of any shallow soil; it is true also of poor sandy soil.

Q. Do you consider that the land out there, 22 and 25 inches in depth, is especially adapted to the raising of deciduous fruit commercially?

A. If the hard-pan is broken up so that the water will permeate, yes.

Redirect Examination.

The method for making tests on phosphoric acid and potash, the only one that is recognized at all, is ascertaining the total amount, or the fusion test. That is the method given by the Association of Official Agricultural Chemists. The method of the strong acid solution is not a standard method. Usually if we can keep potash and phosphoric in an acid solution we know it is enough [104] there for plant growth. If we do not get it we do not know what the total amount is. The only real recognized method is the total amount or the fusion method. The acid solution method was publishing by the Chemists Association in 1898 to 1903, as a method of making a soil solution for chemical analysis, but it was discarded about twenty-five years ago. The difficulty with the acid method is that in varying ways you will get different results.

Q. Do you mean by the quantity of the sample, the size of the sample?

A. The quantity of the sample, the agitation of the sample during the period of solution, the length of time, and so on.

(Testimony of F. E. Twining.)

Q. And the results are not uniform except following the same uniform method? A. No.

Recross-examination.

Q. The method requires it be agitated a certain amount of time, does it not?

A. The old published method of making the acid solution test does not say about the agitation. In making the acid solution it is now customary to actually boil the material, the solution of soil, for a period of several hours.

Q. And that is the way you made *you made* your acid soluble? A. Yes.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFFS (RECALLED IN REBUTTAL).

HERBERT C. DAVIS, a witness for plaintiffs, in rebuttal testified:

The cost of blasting in the Rio Linda lands would vary from sixty to seventy-five cents per hole for a complete job. Ordinarily there are about eighty to a hundred holes to the acre. It is customary to boil the acid soluble method. It is digested [105] at a boiling temperature. I boiled mine.

Cross-examination.

I never shot a hole in the Rio Linda district, but I did right adjacent to it. I never blasted for a single tree in the entire twelve thousand acres of the Rio Linda district.

TESTIMONY OF JAMES B. LEITCH, FOR PLAINTIFFS (IN REBUTTAL).

JAMES B. LEITCH, a witness for plaintiffs, in rebuttal testified:

I live in Rio Linda. I know the Bremer place out there. I have known it since December, 1925. He has never used all of his ten acres for his chickens.

TESTIMONY OF IDA E. PERRA, FOR PLAINTIFFS (IN REBUTTAL).

IDA E. PERRA, a witness for plaintiffs, in rebuttal testified:

I live in Rio Linda. I know Mr. Lambert Hagel. I had a conversation with Mr. Hagel at Mr. Kral's house in November, 1927. Present at that conversation were my husband and myself, Mr. Kral and his wife, and Mr. and Mrs Klein. At that time and place he said to us that the Rio Linda land was too shallow for fruit-tree raising and it was foolish to plant tree fruit there and expect it to grow.

Cross-examination.

At that time, in November, 1927, we had commenced the lawsuit which my husband and I maintained against this company, a suit of the same character as the one which is now being tried. I believe it was in May, 1927.

TESTIMONY OF JOHN V. KRAL, FOR PLAINTIFFS (IN REBUTTAL).

JOHN V. KRAL, a witness for plaintiffs, in rebuttal testified: [106]

I am a neighbor of Lambert Hagel. I had a conversation with him on the first Monday in December. At that time he told me that it was useless to plant fruit on that shallow hard-pan land. He said he had not bought his land from this company; that this company had cheated all that had bought land from it.

Cross-examination.

I am a plaintiff in a suit of a similar character against this company.

Mr. BUTLER.—I desire to make a motion, if the Court please, for a directed verdict. I move the Court to instruct the jury to render a verdict in favor of the defendant upon the following grounds:

(1) That the evidence is insufficient to show that the defendant deceived or defrauded plaintiffs in making the contract referred to in the plaintiffs' complaint for the purchase by plaintiffs from defendant of land.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land purchased by plaintiff from defendant, or the value thereof.

(3) That the evidence is insufficient to show

that plaintiffs have been damaged by any act on the part of the defendant.

(4) That the evidence shows affirmatively that plaintiffs' cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof, of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiffs' cause of action is not barred by said above-quoted provision of said section of said code. [107]

The COURT.—The evidence is in conflict. It is a question for the jury to determine. It is sufficient if the jury takes that view. Motion denied.

Mr. BUTLER.—Exception.

Before the Court's charge to the jury, defendant requested the following instructions:

DEFENDANT'S INSTRUCTION No. 1.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiffs must show that the fraud occurred within three years of the commencement of their action for relief, or if their action was commenced more than three years after the fraud occurred, then they must show, in order to maintain their suit, that they did not discover they had been defrauded until a date within three years of the time they commenced their action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiffs will be presumed to have known what-

ever with reasonable diligence they might have ascertained concerning the fraud of which they complain.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiffs have proven by a preponderance of the evidence both that they did not discover the alleged fraud within the period of three years before they filed their action, and that they could not have discovered it by the exercise of reasonable [108] diligence, three years before they commenced this suit. They were not permitted to remain inactive after the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them. They are not excused from the making of such discovery even if the plaintiffs in such action remain silent. A claim by the plaintiffs of ignorance at one time of the alleged fraud, and of knowledge at a time within three years of the commencement of their action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiffs contracted with defendant to buy land. Plain-

tiffs commenced their action on the 28th day of February, 1928; their contract with the defendant for the purchase of its land was made in September, 1921. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiffs in the making of this contract, then before you can find a verdict in their favor, you must also believe from a preponderance of the evidence that they neither knew of the fraud, nor could, with reasonable diligence, have discovered the fraud before a date three years prior to the commencement of their action, that is, before the 6th day of February, 1925. If you believe from a preponderance of the evidence that plaintiffs either knew of the facts constituting the alleged fraud before February 28th, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant. [109]

DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiffs' discovery of the alleged fraud that if plaintiffs discovered that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the falsity of any material representation concerning the land.

DEFENDANT'S INSTRUCTION No. 3.

You are instructed that plaintiffs cannot recover in this action unless they were deceived by the alleged representations for if the means of knowledge are at hand, equally available to all parties, and the subject of purchase is alike open to their inspection, if the purchasers do not avail themselves of these means and opportunities, they will not be heard to say that they have been deceived, unless they were induced by trick or misrepresentation of defendant not to make such inspection.

DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation. [110]

DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered, the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant. [111]

The COURT. (Orally.)—You have heard the

evidence, and the arguments, and now it is for the Court to deliver to you the instructions. These are merely to make you acquainted with the law which applies to the case, and in the light of which you will determine the facts. Remember, you take the law from the Court, but when it comes to the facts in the case, what witness to believe, what weight to give to the testimony, the inferences to draw from the circumstances, that is exclusively your function. The Court may comment on the facts, may express an opinion with respect to the facts, but unless it does so as a rule of law where there is no conflict in the evidence you are not bound by the opinion of the Court on the facts, and the Court does not seek to bind you. It may express it in the hope that it may aid you to reason out the case to a correct conclusion.

This is a civil action. The plaintiff purchased certain lands from the defendant in what is known as the Rio Linda District, adjacent to your city, some ten or twelve miles out. They paid $2,750 for ten acres of land. You can ignore the improvements, the well and the chicken-house, because there has been no question raised in respect to that value. The plaintiffs allege that they bought this land because induced thereto by false representations made by the defendant, without which they would not have bought it, they say. And they say that these false representations, taking the general statement of counsel in their opening, and in the course of the evidence and in their final arguments, in sub-

stance were that the land was adapted to commercial orcharding, and was worth more than $275 an acre. The allegations [112] in respect to the false representations by plaintiff set out in the complaint are different in language, but that is what counsel for both parties take them to mean, what I have indicated.

The plaintiffs are not obliged to prove the false representations literally. If they prove them in substance it is enough. So it comes down to that. They allege that the false representations were that the land was well adapted to commercial orcharding, and that the defendant also represented that it was worth more than $275 an acre, which they paid. The defendant denies that those representations were made, or were false if they were made.

The burden of proof is upon plaintiff. That simply means that after all the evidence is before you, Gentlemen of the Jury, and in consideration of it all, if you do not find that plaintiffs' case is sustained by the greater weight of the evidence your verdict must be for the defendant. Before plaintiffs are entitled to recover, it must appear to you from a consideration of the evidence that the vital elements of the plaintiffs' case have been proven—not one, but all of them, by the greater weight of the evidence. If you believe the evidence is equally balanced on any one of these elements, or if it weights heavier in behalf of the defendant, the defendant is entitled to your verdict.

Coming now directly to what the plaintiff must

prove as matter of law, the Court will say to you as follows:

First, the plaintiffs must prove that the representations were made. That is to say that the defendant, to induce this bargain, represented to them that the land was [113] well adapted to commercial orcharding, and worth more than $275 an acre. If plaintiffs prove either one of those representations it is enough to serve that branch of the case, and you proceed to the next step in the case. First, were the representations made? There is no question, Gentlemen of the Jury, that regardless of what Amblad may have said to the plaintiffs, and they say he did represent it as adapted to commercial orcharding, the defendant's book does make that representation. The defendant, being a corporation, it speaks by its agents, and its agents may speak orally or by advertising literature, such as this, which, of course, was prepared by some agent. So you find it in the book. No other reasonable interpretation can be placed upon it, and it was admitted in argument that the representation was made to the plaintiffs that the land was well adapted to commercial orcharding. No other reasonable construction can be made of it. It is not a question of how much truth is in the book, Gentlemen of the Jury, the question is whether that representation was made, and whether, as I will subsequently state to you, it was false.

In respect to the allegation that the representation was made, made to plaintiffs that the land was worth more than $275 an acre, both the plaintiffs

testify that Amblad did represent that to them. And the brother of the plaintiffs, who was there, testified to the same thing; and Amblad says nothing about that when he testifies. So there are the two plaintiffs and their witness testifying that the representation was made, and no evidence in denial on the part of the witness Amblad, who represented the defendant in that transaction.

If you find, then that those representations [114] appear to have been made, by the greater weight of the evidence, and that as to the adaptability of the land for commercial orcharding is clearly made in the book, then the next step is this: As matter of law, it must appear, by the greater weight of the evidence, that those representations, or either one of them, was false. That is the big issue in the case for you, Gentlemen of the Jury, was either of those representations, if both were made, false? Was the land well adapted to commercial orcharding? You have heard the evidence on both sides. The hour is getting late, and the Court will not attempt to detail it again to you.

Plaintiff presents certain witnesses who live on the Rio Linda lands, and have tried raising trees, as they tell you. They tell you the circumstances, and that after a certain two or three years, during which they flourish, they begin to fade, and become stunted, and some die. One of the witnesses for the plaintiff tells you that on the shallower of the soil the trees only attain a small growth, while on the deeper soil they grow better, indicating the inference he would have you draw, that the deeper

the soil the better the trees flourish. The evidence is that the soil is from eighteen inches in depth overlaying the hard-pan up. The witness Davis said the average is twenty-two inches, only. Mr. Davis is an agricultural specialist; he assumes to have a special learning in respect to this matter. He says that five feet of soil is necessary to the successful growing of trees as a commercial orchard enterprise. He gives you the reason; first, it must have the necessary food elements, and sufficient capacity to store them; it must have the necessary capacity to store water, and to furnish the trees [115] with moisture, and, at the same time, it must not be so shallow that the water will accumulate there and drown out the roots of the trees; and also necessary for anchorage and to perpetuate the life of the tree for a sufficient length of time so as to render the enterprise as a whole commercially profitable. You will understand, too, that defendant's book says that it takes five to ten years to bring an orchard to bearing commercially; of course, there is a long period of large expense which must be met. Whenever the orchard does begin to bear it must live long enough to liquidate all the past and all the future expenses while it is yet bearing, so that, on the whole, it will be profitable. Just like yourselves in business, in any business enterprise you have to liquidate all your preliminary expenses, your overhead, and the business has to last long enough so that it will, over the entire time, pay you some profit.

Mr. Davis further testifies that this soil is deficient

in the vital elements of potash and phosphoric acid. Those are vital elements, not only in the growth of all vegetation, but particularly in the production of fruit. He says there is only about one-third enough potash, and that the phosphoric acid is barely adequate.

Mr. Davis further tells you that it is impossible to blast this land, as some say, to prepare it for a commercial orchard, because the hard-pan is too deep, from six to sixteen feet, I think he says. He says if it were about two feet it might warrant the expense of blasting to make it a commercial enterprise, if the subsoil below the hard-pan could be reached, and thus afford drainage, and so the roots of the tree could penetrate and get that anchorage which is necessary, [116] and also so that moisture could be afforded. Mr. Davis testifies that he has had practical experience in that section, in Antelope, adjoining this land.

It is fair to say that, so far as practical experience goes to any great extent, there, I think it seems to me he has had more than anyone else, seven years on a large scale, some 150 acres of orchard, lands about like these in Rio Linda. He says so far as their depth is concerned, with the hard-pan below, that his seven years' experience proved what he had been taught in school, that those shallow lands over hard-pan will not afford a commercial orchard enterprise that will be successful.

Mr. Davis tells you how much he lost in the seven years that he operated at Antelope. He tells you

that his teaching in school was that it takes at least five feet of soil. I think he testified to that in this case. There are so many of these cases that we get mixed up on them, sometimes. Mr. Davis pronounces it as his opinion, as do some of the others that plaintiffs produced living on the land, that this land of plaintiffs will not produce the deciduous fruits commercially and at a profit.

The defendant resists the case thus made by plaintiffs, and to offset it they bring before you a number of witnesses who live on the Rio Linda lands and adjacent land, some who have their family orchards, some who have assumed to be engaged in commercial orcharding. Their testimony, as you will remember it, is that on these shallow soils, if prepared by blasting—and some say without blasting, some who have the small orchards, that their trees do well, and, in their judgment, they will produce commercial crops successfully. [117] Among those are Mr. Wanzer and Mr. Holmes, who have quite extensive orchards. Holmes sold his. They have been orcharding out in Arcade, not far from these lands, and the general situation seems to be much the same, except in so far as there may be local variations in depth of hard-pan, and its slope, to effect that essential drainage. They planted in 1922. In 1926 they had good crops, they say. They don't say what they had, if anything, in 1927. Mr. Wanzer said that in 1928 he had a larger crop, but that prices were such, that, I think, he did not harvest it at all.

The test of a commercial enterprise and land

adapted thereto is not its ability to produce a crop for one year, or its failure for one year, though a good crop one year might indicate it would do the same through a series of years, or a failure one year might indicate that it would fail through a series of years. That is a matter for your determination. A commercial enterprise means where the land is of that quality and character that, with reasonable care and diligence, it would produce the deciduous fruits in reasonable quantities, which, under normal conditions of the market, will return a profit, and that through a series of years, taking one with the other, which will make the enterprise profitable as a whole. Otherwise, it is not commercial. These gentlemen more or less adhere to the view that the land is fitted for commercial orcharding, though Mr. Wanzer said he would not recommend buying land only 22 inches deep, such as the average of the plaintiff's, unless plenty of dynamite was used to blast it up.

It must be remembered, Gentlemen of the Jury, that the representation made by the defendant to the plaintiff was that [118] the land is adapted to commercial orcharding. Not that it can be prepared for commercial orcharding by sufficient expenditure of time and labor to dynamite it. It is fair to say that if you give sufficient time and labor that you might reduce land to a state of commercial orcharding, although originally it was of basic granite.

The book says it is adapted to commercial orcharding, and that was the representation of the

defendant to the plaintiffs, not that it can be prepared at great expense. Mr. Twining says it would cost $20 to $30 an acre to blast it, as he sees it. Mr. Davis says on his experience that it would cost 60 to 75 cents a hole, and that there are 80 to 100 trees to the acre, which would bring it up to something like $48 to $75 an acre, depending on the price.

The defendant also presents Mr. Twining as its expert. You must remember, Gentlemen of the Jury, that when it comes to expert testimony it is the same with reference to any other witness; you are not obliged to believe anything is so simply because some witness swears it is so, whether he is called an expert witness, or not. You test it out by the test of reasonableness, and determine where the truth is. Experts are those assumed to have special knowledge and learning on a particular subject which is not obvious to the average man without such learning, and out of his learning he speaks to you. In so far as you believe he has the learning and is well informed, and honestly expresses his opinion to you, you will give him credit, and no further.

Mr. Twining and Mr. Davis differ very much in respect to this land, even in the chemical analysis, which is supposed to be capable of absolute proof. Of course, there is no such thing [119] as absolute proof in anything. Mr. Davis says he finds only about one-eighth or one-ninth as much potash as Mr. Twining, and one-third or one-fourth as much phosphoric acid as Mr. Twining. In other

words, putting it the other way, Mr. Twining finds that much more than Mr. Davis. Now, what are we to determine when experts thus disagree; where are we people of less knowledge in that particular science to take a stand. It is for you to say. Take all the circumstances of the case as disclosed to you, Gentlemen of the Jury, and determine as to any difference between witnesses, and especially experts, where the truth lies between them, and with which one does it prevail?

Mr. Twining further testifies that this hard-pan is not so deep, two or three inches of hard-pan, and below it is of different character, and that if you blast through the upper portion the water will penetrate the layer and disintegrate it and dissolve it, and that the roots will penetrate it, and there will be afforded drainage and moisture, which he, too, says are essential to the successful growing of these trees.

It is a fair inference, Gentlemen of the Jury, that those witnesses, that is, those better informed—Wanzer, Holmes, Twining, Morley, rather agree with Mr. Davis that shallow soil is not adapted to the successful commercial orcharding, because they all say it must be prepared by blasting; they rather agree with him that five feet is not too much for moisture and for drainage, and the like, because where it does not exist in the deep soil they say you must blast and furnish it below. So there is not so much discrepancy between the experts there. But Mr. Twining and Mr. Davis between [120] the rather essential mineral elements of the land.

And, as I have said, as to which one you will believe, you will determine that for yourselves.

Mr. Twining says this land is adapted to commercial orcharding, if properly prepared by the requisite blasting, and the like. He tells you about other lands in Fresno, Merced, Oroville, the east side of Sacramento, and the like, where, on like lands, commercial orcharding is successfully carried on. Now, it is for you to say whether the lands have been proven adapted to successful commercial orcharding, or, rather, it is for you to say is the defendant's representation that they are adapted to successful commercial orcharding false? That is the question for you. Does that appear by the greater weight of the evidence, that the representation is false? If it does, then the plaintiffs' case is made out thus far.

And, coming to the value of the land, the experts, again, differ. There it is a matter of opinion, but it is a very wide divergence of opinion, and it would look as if opinions were not worth so very much, after all, when men can thus differ. You have the testimony of Mr. Kerr for the plaintiffs, and the testimony of Mr. Geddes for the defendant. Mr. Kerr says that at that time, in 1921—and that is the vital time, Gentlemen, the land was worth $75 an acre. Mr. Geddes said it was worth $350 an acre. Mr. Geddes said it was worth $75 an acre more than the defendant got for it. Mr. Kerr says it was worth $200 less than the defendant got for it. Now, as to those two witnesses one may have gone over that land very quickly; Mr. Kerr may

have looked at it very quickly. I think we can take it for granted that any of you who are engaged in selling goods can go out and, with a very short [121] inspection of like goods, you can determine their value, even though you did not know them for years, and had but a very limited acquaintance with them. Mr. Kerr says that he has been in the real estate business for twenty or twenty-five years, he knows the values, he went to see this particular ten-acre piece a few days ago, and from his general knowledge of conditions—that is substantially his testimony, or the inference to be drawn from it—he thinks it is worth $75 an acre.

Mr. Geddes testifies that he knows the land, knows it very well, knew it when it was in the grant, and that in his opinion it was worth $350 an acre. Now, Gentlemen, it is for you to say what it was worth. You have a fair knowledge of conditions surrounding this city and country prevailing in 1921, and while you are not to substitute your knowledge for the witnesses' it does enable you to determine which witness is speaking truthfully, or wherein between them the truth lies. You will determine how much the land is worth.

Unless you find it is proven by the greater weight of the evidence that the land was less in value at that time than $275 an acre, plaintiffs' case fails, and your verdict must be for the defendant, because even if it were falsely represented to be valuable for commercial orcharding, if it is not proven to be of a value less than what the plaintiffs paid for it, they have not been damaged. You can all

see that at once. A man cannot recover damages, no matter what false representations induced him to buy, if he got as much as his money's worth when he paid for it.

If you find by the greater weight of the evidence that [122] the land is proven to have been worth less than $275 an acre at that time, you proceed to the next step, and that is, that the defendant is not liable in any way unless they knew those representations, or either of them, were false, or unless the defendant ought to have known it, or unless the defendant make the representations in a positive fashion which presumes knowledge, and which it cannot now deny. Did it know if the land was not adapted to commercial orcharding successfully? Did the defendant know it? It had been handling these lands at that time some eight or nine years. I think the book says it sold the first tract out there in this project in 1912. It had experts, horticultur*al*ists—undoubtedly a man is pretty well presumed to know what he owns in respect to its adaptability to any purpose, especially if he has experts in that particular purpose.

Furthermore, if it did not know it, should it not have known it during all these years that it had it, and selling it out in the market to people on these representations that it was valuable for fruit as a commercial enterprise? Moreover, it states in this book that it is proven beyond a doubt. Nothing stronger can be said than that, Gentlemen, that it is proven beyond a doubt that this land is adapted to commercial orcharding.

When they made that representation, Gentlemen of the Jury, the law implies they knew whether it was true or false. If it was false they are bound by it, and would be liable accordingly.

And so in respect to values. If it was not worth $275 an acre, did defendant know it, taking into consideration all their experience with the land? If you find that the defendant did know that the land was not adapted to commercial [123] orcharding, or ought to have known it, or positively asserted, as it did, that it was, the law presumes knowledge, and the plaintiffs' case is so far made, and you proceed to the next step.

The law says the defendant is not liable unless it made the representations with intent to make the plaintiff believe them, and to act on them, and to deal with the defendant. To what end did the defendant make the representations? What does a merchant, or anyone else, put out an advertisement for but to excite the credit of those who read the advertisement and to secure the belief of the prospect and induce him to buy? They certainly do not want you to believe they are lying? They do not want to drive you away. They do not want to defeat the bargaining. They do it for the purpose of bringing about a bargain. So the only reasonable conclusion there, Gentlemen, would be that the defendant did intend to bring the plaintiffs into the bargain. That is all the intent that is necessary. It is not necessary that any agent of defendant should have had in the back of his mind the gross idea, I will cheat these plaintiffs, I will

deceive them, I will defraud them. No. If they intended to make these representations to induce the plaintiff to believe them and to bargain with them, that is the only intent necessary to make the defendant liable. Remember, the defendant speaks only by its agents. Whatever its agents say, whatever its written agent, the book, says, is the language and the statement of the defendant corporation, and it is liable for them.

Then the next step. The law is that unless the plaintiffs believed the representations and did rely upon them, [124] in whole or in part, to some extent, at least, then there is no liability, because if the plaintiffs did not believe them, if they did not influence the plaintiffs to buy the land, they have not been harmed by them, they are simply out of the case, they are superfluous. Did the plaintiffs believe them? They say they did. They were Minnesotans; they knew nothing about California, or California fruit, from the practical side, never having been here. All the knowledge they had they got from defendant's literature, and talking with their neighbors, so they say. They so testified. Remember if your recollection is different from that of the Court, or if your recollection is different from that of counsel as they stated the testimony to you in their arguments, it is your recollection that controls in respect to the evidence.

They say that Amblad came to them after they had read the book first, and told them the same things that were in the book, and that they believed them. He finally told them on the 29th of Sep-

tember, If you don't buy before October 1st the land is going up in price. That appealed to their sense of thrift, and they did sign the contract that night.

It is not necessary that the plaintiff should have intended to start a commercial orchard. If the seller of land attaches to it an attribute of value and the buyer appreciates it gives a value to the land, whether in the present or in the future, if he did want to sell it again, and he is to some extent influenced by that assigned attribute, that is enough to entitled him to recover, if it is false.

So, here, even if the plaintiff had not intended to go into commercial orcharding when it was represented to them that [125] this land was adapted to commercial orcharding, if they appreciated that as something that gave additional value to the land, and they bought it because of it, the mere fact that they did not intend to go into commercial orcharding right away, or at all, is immaterial. But they tell you that they did intend to go into commercial orcharding eventually. They say they followed the plan of the book, which says that there is a long period after planting before the orchard is in bearing; they must have an income in the meantime, they must go into the chicken business. They tell you that Amblad told them that. Amblad says, however, that he did not tell them anything about commercial orcharding, although he talked about fruit, and that they were only talking chickens. After they got here the plaintiffs followed the book, they went into chickens,

and after due course of time they began to grow trees, to test out the land to see what it would do in the way of fruit.

So if you find by the greater weight of the evidence that the plaintiffs believed those representations, and to some extent relied upon them, in whole or in part, and were thereby induced or influenced to some extent to buy by reason of it, the plaintiffs' case is made out thus far. Ask yourselves, What does California stand for in the east, what its trademark is other than climate and fruit. I want to say right here, Gentlemen of the Jury, that the law presumes that all transactions are fair and honest until that presumption is overcome by the evidence in the case. But the resources of California and the state are great enough that they need no false representations to sell them abroad. It is not good for the state. I am not saying [126] there were any. That is left for you. You must not get the idea into your head that just because you are Californians you must uphold the credit of the state and the value of its lands by thinking that that was ordinary puffing for the selling of land, if they were false. If they went beyond that and made false statements, they had no right to do it. You cannot induce any man to enter into a bargain by false statements and escape liability.

Now, the next step. If you find that the plaintiffs were influenced to enter into the bargain, the next question is, were they damaged? If they were not damaged they are not entitled to recover. And that brings you right back again to the question

of the value of the land. If you find the land was worth less than $275 an acre, they are entitled to the difference. If the plaintiff paid $275 per acre for this land and it was not worth that, they are entitled to be made whole in that respect. If you find, and this is simply by way of illustration, that the land was only worth at that time $100 an acre, the plaintiffs should recover the difference between $100 and $275 an acre, or $175 an acre. If you believe it was worth $200 an acre in 1921, plaintiffs would be entitled to recover $75 an acre, and so on. Then there are other damages. The plaintiffs say that after the recommendation was made to them that the land was well adapted to commercial orcharding, they started to try it out with fruit-trees, and they planted some and they died. They did not flourish. Therein they say they spent some hundreds of dollars—$200 for the trees, and to blast the ground and plant them. Cultivation $50. Then they say they spent a certain amount of money for an additional well [127] and a certain plant that otherwise they would not have spent except for the trees. Well, Gentlemen, I rather think that that might take rank, so far as the well and the pump are concerned, of a permanent improvement for whatever purpose they will see fit to adapt the land to, and I think no damages should be allowed for that. In other words, those matters have not been proven with sufficient definiteness. They admit the plant has some value. It is hardly possible to make out any damage there with any reasonable certainty. So I think you will limit

yourselves to the damages on the score of the trees, if you give any damages at all, and to that of the cultivation, and for the blasting of the trees, in such reasonable amount as you may find, not exceeding $250, as you believe plaintiffs to be entitled to, that they have proved that they spent.

But that is not quite all the case, Gentlemen of the Jury. The plaintiffs purchased this land away back in 1921. If they were deceived by false representations, if false representations were made, they were deceived at that time. The law is that they must begin their suit to recover within three years after they discover the fact that they have been deceived. This deception is secret, and plaintiffs are not bound to bring suit until they discover it, and within three years thereafter. The suit was begun on February 6, 1928; so the three years within which they could begin the suit began on February 6, 1925. Unless you find from the greater weight of the evidence that they did not discover the fact that they were deceived before February 6, 1925, they are not entitled to recover in any event. The statute of limitations would run against them. That is the policy [128] of the law, Gentlemen, and in proper cases it must be enforced. They say they did not discover the fact. They say they came here in 1922, and did some building, wherein they discovered some hard-pan down at eighteen inches, but that that did not mean anything to them. If it excited any suspicion, the plaintiff said he went to Mr. McNaughton, the company's horticultur*al*ist, and McNaughton told him

that was not harmful, that all you have to do is to blast that, and that it is really very good for the fruit-trees when blasted, it has lime in it, etc., and is in the nature of fertilizer. I think Mrs. Lindquist testified the same thing, but I don't remember about that. Anyway, that is what the plaintiff Lindquist says McNaughton told him. Well, remembering, Gentlemen of the Jury, that the plaintiff knew nothing about fruit, and knew nothing about land, and what was essential to successful orcharding, and if he believed the representations in the first place, were they not allayed and quieted, if he had any suspicions, by Mr. McNaughton, the company's horticultur*al*ist—by what he said to him? There is no denial that McNaughton said that. The law in respect to that is that the party who has been deceived, when he discovers reason to believe that he has been deceived, must pursue the inquiry with such diligence as a prudent man, in the circumstances, would, when he discovered it is the time when the statute begins to run. He is not required to employ experts in order to discover that. It seems here to be a matter of expert knowledge, or experience, to determine whether land is adapted to commercial orcharding. You have heard the experts differ on it; you have heard men of experience differ on it. The plaintiff came here without experience. He is not obliged to employ an expert to tell him about it. If, believing the representations in the [129] first place, and he then relied on the further representations allaying his suspicions, he is not bound by the limit of

time until he makes the actual discovery. They planted trees in 1924 and 1926; they died after a year or two; they say that for the first couple of years they did fairly well, but that finally they died. Mrs. Lindquist says she went to see Mr. Schei when some of the trees died. Schei was one of the representatives of the company here. He said, so Mrs. Lindquist testifies, "That is nothing; this is a sour sap year; a tree is liable to die any place on occasions." She testifies that Schei said they died once in a while anywhere, this is the year of sour sap, and that sour sap caused it. That was in 1926. There is no evidence, that I remember, that there was any sour sap in 1926, and she says that is what Schei told her. Anyhow, that was after the time when they would be barred. So that may be dismissed from your mind. If you do not find from the greater weight of the evidence that the plaintiff had knowledge before February 6, 1925, or had notice of such facts that with reasonable inquiry they should have had knowledge, then their suit is in time, and they are entitled to recover accordingly.

Now, just a word or two in reference to witnesses. A witness takes the stand to aid you in arriving at the facts in the case. He is supposed to tell you the truth. It is for you to determine how far a witness has testified fully and truthully, how much he knew, whether he knew what he was talking about, and to what extent, and whether he reported it honestly to you. You determine the truthfulness of the witness on the stand the same

way that you do in dealing with men with whom you come in contact in your daily [130] lives; you take note of their demeanor, the reasonableness of what they say to you, whether they are contradicted by previous statements of their own—there has been some evidence tending to show that in this case, or whether they are contradicted by other witnesses whom you prefer to believe, or whether they are contradicted by circumstances. Very often you prefer to believe the circumstances rather than the testimony of any number of witnesses. It is an old saying that you are not obliged to believe anything is so simply because a witness swears it is so. It must first recommend itself to your judgment and to your credibility.

One witness is enough to prove any disputed fact in this case. The mere number of witnesses is not vital. If it were, you can see that one side might throw in a greater number of witnesses than the other. If that were the rule, you might as well take them out and weigh them on a scale and see which is the heavier. That is not the law. If all witnesses appear to be possessed of equal knowledge and equal ability to remember it and report it to you, and of equal honesty therein, then the number of witnesses might be material, and probably would be, to carry weight with you. After all, Gentlemen, it is a matter for your judgment.

When you retire to the jury-room you will select one of your number foreman, and proceed to a verdict. It takes twelve of your number to agree on a verdict in this case.

Any exceptions for plaintiffs?

Mr. McCUTCHEN.—None.

The COURT.—For defendant?

Mr. BUTLER.—We except to the charge as a whole; and particularly, to the instructions on the subject of representations [131] claimed to have been made by defendant to plaintiff, both as to the growing of fruit, and as to the question of value.

We except to the instruction upon the question of the falsity of the representations.

Also to the instruction upon the subject of the knowledge of the falsity on the part of the defendant.

Also to the instruction as to the question of belief on the part of the plaintiffs, and reliance thereon.

Also to the instruction on the measure of damages. Also to the instruction as to the date of the discovery of fraud, if any.

We also except to the failure of the Court to give defendant's proposed Instruction No. 1, upon the matter of the statute of limitations.

We also except to the failure of the Court to give defendant's proposed Instruction No. 2, concerning the effect of the discovery by plaintiffs of the falsity of a material representation.

Also to the failure of the Court to give defendant's proposed Instruction No. 4, concerning distinctions between representations and matters of opinion.

Also to the failure of the Court to give defendant's proposed Instruction No. 5, concerning the effect of plaintiffs having been able by reasonable

diligence to discover the alleged falsity of representations as to value.

We also except to the instruction upon the subject that defendant, by its book, represented plaintiffs' land to be well adapted to the growth of deciduous fruits commercially, and also that the statements in defendant's literature applied [132] to the land *applied to the land* purchased by the plaintiffs.

The COURT.—Gentlemen of the Jury, it is now late, and I propose to leave the building. You will arrive at a verdict, and when you do so the foreman will sign it and place it in an envelope and put it in his pocket, and then you may disperse to your homes, keeping secret the conclusion at which you have arrived, and you will return here to-morrow morning at ten o'clock. You do not separate, Gentlemen, until you have arrived at a verdict.

(Thereupon the jury retired, and subsequently returned into court and rendered a verdict in favor of plaintiffs and against the defendant, and assessed the damages in the sum of $1,800.00.)

Defendant proposes the foregoing as its bill of exceptions on appeal from the judgment in said cause, and prays that it be allowed and settled as such.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant.

Dated: November 24, 1928. [133]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions do not appear in the record of said cause, I, ————, Judge of the District Court, upon the stipulation of the parties, have settled and signed the said bill, and have ordered that the same with amendments accepted and allowed be made a part of the record of the said cause, this 20 day of December, 1928.

BOURQUIN,
District Judge.

[Endorsed]: Filed Dec. 27, 1928. [134]

[Title of Court and Cause.]

PROPOSED AMENDMENTS TO PROPOSED BILL OF EXCEPTIONS.

Come now the plaintiffs and propose that defendant's proposed bill of exceptions be amended as follows:

1. At the beginning of the bill of exceptions insert: "Defendant's demurrer to plaintiffs' complaint came on regularly for hearing on the 12th day of March, 1928. Defendant appeared by its counsel and consented that this demurrer to plaintiffs' complaint might be overruled."

(If the record of the court supports, allowed. Otherwise disallowed.—BOURQUIN, J.)

2. Page 25, line 2, strike out "evade" and insert in place thereof "avoid."

3. Page 70, line 5, insert: "The cause was thereupon argued to the jury by counsel for the respective parties. In the course of the argument counsel for the defendant admitted that defendant had represented to plaintiffs that the entire tract of land, including the piece sold to plaintiffs, was represented by defendant to be well adapted to the growing of deciduous fruits commercially."

(Nothing to show occurred. Disallowed.—BOURQUIN, J.) [135]

4. Page 85, line 12, correct "1921" to read "1912."

5. Page 87, line 23, correct the word "office" to read "orchard."

6. Page 89, line 20, correct the figure "$200.00" to read "$275.00."

7. Page 90, line 22, correct the word "secrecy" to read "secret."

8. Page 91, line 18, correct name to "McNaughton."

9. Page 91, line 27, correct the word "successful" to read "commercial."

10. Page 92, line 9, after "this is" insert "a" and correct the word "here" to read "year."

11. Page 93, line 3, after "has" insert "been."

12. Page 93, line 7, after "circumstances" insert "rather."

Dated: December 3, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

Due service and receipt of a copy of the within proposed amendments to proposed bill of exceptions is hereby admitted this 3d day of December, 1928.

EDWARD P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 5, 1928. [136]

[Title of Court and Cause.]

NOTICE OF REJECTION OF PROPOSED AMENDMENTS TO PROPOSED BILL OF EXCEPTIONS.

To the Above-named Plaintiffs, and to Messrs. Ralph H. Lewis and George E. McCutchen, Attorneys for Said Plaintiffs;

PLEASE TAKE NOTICE: That defendant does not accept your proposed amendments numbers 1 and 3 to its proposed bill of exceptions.

The proposed amendments, numbers 2, 4, 5, 6, 7, 8, 9, 10, 11 and 12 are accepted.

Dated: December 6, 1928.

ARTHUR C. HUSTON,
E. P. KELLY,
BUTLER, VAN DYKE and DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 17th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 18, 1928. [137]

[Title of Court and Cause.]

STIPULATION WAIVING NOTICE OF PRESENTATION OF PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that defendant's proposed bill of exceptions in the above-entitled cause, with plaintiffs' proposed amendments thereto, and defendant's notice of rejection thereof, except as to the proposed amendments which have been accepted, may be presented to Hon. George M. Bourquin, who presided at the trial of the above cause, for settlement, without further notice or argument.

Dated: December 8th, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.
E. P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 18, 1928. [138]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND COST BOND.

On the filing by defendant of a petition for appeal, with assignment of errors, and on motion of defendant, by its attorneys, IT IS HEREBY ORDERED:

That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered herein, be, and the same is hereby, allowed.

AND IT IS FURTHER ORDERED that upon the giving by defendant of a good and sufficient bond, in the sum of Three Thousand Six Hundred ($3,600.00) Dollars, and conditioned as required by law, and the rules of this court, all further proceedings in the said court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals or by the Supreme Court of the United States, upon a petition for writ of certiorari.

IT IS FURTHER ORDERED that the amount of cost bond on said appeal be, and it hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned as required by law and the rules of this court.

The supersedeas and cost bond may be embraced in one document.

A. F. ST. SURE,
United States District Judge.

Dated: Dec. 5, 1928. [139]

Service hereof is hereby admitted and receipt of copy acknowledged this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 7, 1928. [140]

[Title of Court and Cause.]

SUPERSEDEAS BOND AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Sacramento Suburban Fruit Lands Company, a corporation organized and existing under the laws of the State of Minnesota, as Principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, and authorized under the laws of the State of California and the above-entitled District, to act as sole surety on undertakings of this character, as surety, are held and firmly bound unto H. A. Lindquist and Selma A. Lindquist, the above-entitled plaintiffs, in the full and just sum of Three Thousand Eight Hundred Fifty ($3,850.00) Dollars, to be paid to the said H. A. Lindquist and Selma A. Lindquist, their attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of December, 1928. [141]

WHEREAS, lately at a District Court of the United States for the Northern District of California, Northern Division, Second Division thereof, in a suit pending in said court between said H. A. Lindquist and Selma A. Lindquist, as plaintiffs, and Sacramento Suburban Fruit Lands Company, as defendant, a judgment was rendered against the said Sacramento Suburban Fruit Lands Company in the sum of One Thousand Eight Hundred ($1,800.00) Dollars, and in the further sum of costs amounting to $39.10, and the defendant having been allowed on appeal from the judgment to the United States Circuit Court of Appeals for the Ninth Circuit; and the Court having made an order for supersedeas, staying all proceedings in the District Court pending final determination of said appeal, provided the defendant give a bond in the sum of Three Thousand Six Hundred ($3,600.00) Dollars, conditioned according to law; and the Court having fixed the amount of cost bond on said appeal in the sum of Two Hundred Fifty ($250.00) Dollars, and the Court having ordered that the supersedeas bond and bond for costs might be combined and embraced in one document,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Sacramento Suburban Fruit Lands Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the

above obligation to be void; else to remain in full force and virtue.

AND IT IS FURTHER EXPRESSLY AGREED by said surety that in case of a breach of any condition hereof, the above-entitled court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the action in which this bond is given to ascertain the amount which said surety is bound to pay on account of said breach, and to render judgment therefor against it and to award execution therefor. [142]

IN WITNESS WHEREOF, said principal and surety have executed this undertaking, attesting such execution by their respective seals, all on this, the 8th day of December, 1928.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation.

[Seal] By A. E. WEST,

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation.

[Seal] By J. W. S. BUTLER,
Attorney-in-Fact.

State of California,
County of Sacramento,—ss.

On this 8th day of December, 1928, before me, a notary public in and for the County of Sacramento, State of California, personally appeared J. W. S. Butler, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Standard Accident Insurance Company, and he acknowledged to me that he subscribed the name of Standard Accident Insurance

Company thereto, as principal, and his own name as the attorney-in-fact.

[Seal] GERALD M. DESMOND,
Notary Public in and for the County of Sacramento, State of California.

Form of bond and sufficiency of sureties approved.

Dated: Dec. 11, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 12, 1928. [143]

[Title of Court and Cause.]

ORDER TRANSMITTING EXHIBITS.

It appearing to the Court that the exhibits of plaintiffs and defendant, except the perishable exhibits and samples of hard-pan, should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit in their original form,—

IT IS HEREBY ORDERED that said exhibits, except the perishable exhibits and samples of hard-pan, be transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit in original form, with the bill of exceptions, and need not be printed as part of the record herein.

Dated: January 14th, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 14, 1929. [144]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare a record on appeal containing true copies of the following papers in the above-entitled action:

1. Order removing said cause from the Superior Court of the State of California to the District Court of the United States.
2. Complaint.
3. Demurrer to complaint.
4. Order overruling demurrer.
5. Answer.
6. Minutes of trial.
7. Verdict of the jury.
8. Judgment.
9. Petition for appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Proposed amendments to bill of exceptions.
13. Notice of rejection of proposed amendments.
14. Stipulation waiving notice of presentation of bill of exceptions.
15. Order allowing appeal.
16. Citation.
17. Supersedeas and cost bond.

18. Order transmitting exhibits.
19. Praecipe for transcript.

J. W. S. BUTLER,
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant. [145]

Service hereof is hereby admitted and receipt of copy acknowledged this 22 day of January, 1929.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 22, 1929. [146]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 146 pages, numbered from 1 to 146, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of H. A. Lindquist et al. vs. Sacramento Suburban Fruit Lands Co., No. 473—Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is

the sum of Sixty-two and 30/100 ($62.30) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of Jan., A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [147]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to H. A. Lindquist and Selma A. Lindquist, Appellees, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Sacramento Suburban Fruit Lands Company, a corporation, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated: This 5th day of December, A. D. 1928.

A. F. ST. SURE,
United States District Judge. [148]

Due service of within citation is hereby admitted this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Appellees.

Citation on Appeal. Filed Dec. 7, 1928.

[Endorsed]: No. 5703. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Suburban Fruit Lands Company, a Corporation, Appellant, vs. H. A. Lindquist and Selma A. Lindquist, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed January 30, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

ORIGINAL

No. 5703

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

H. A. LINDQUIST and SELMA A. LINDQUIST,
Appellees.

BRIEF FOR APPELLANT.

BUTLER, VAN DYKE & DESMOND,
Capital National Bank Building, Sacramento,
EDWARD P. KELLY,
Metropolitan Bank Building, Minneapolis,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 5703

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),

Appellant,

vs.

H. A. LINDQUIST and SELMA A. LINDQUIST,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Appellant is a corporation organized under the laws of the State of Minnesota, and resident therein. In 1912 it became the owner of approximately twelve thousand acres of land lying about ten miles north of the City of Sacramento, in this state, which it subdivided into five and ten acre tracts for the purpose of selling the same. It issued literature descriptive of its project and in addition employed salesmen and agents. In September of 1921 appellees purchased a ten acre tract of land from appellant at a price of two thousand seven hundred and fifty ($2750.00) dollars, which they subsequently paid, whereupon the land was conveyed to them by appellant. On February 6, 1928, approximately six years and four

months after they purchased the land, appellees began this action seeking to recover damages for alleged fraud in connection with that purchase. Their complaint alleged that though now citizens of California, they were at the date of their purchase, residents of the State of Minnesota; that they were wholly unfamiliar with California farm and fruit lands, and with the nature, quality and values thereof; that with intent to cheat, and defraud, them, appellant falsely represented that all the ten acre tracts of land in California then being sold by it were of the fair and reasonable value of two hundred seventy-five ($275.00) dollars per acre; that all of the land was rich and fertile and capable of producing all sorts of farm crops and products; that it was entirely free from all conditions and things injurious or harmful to the growth of fruit trees; that the land was perfectly adapted to the raising of fruits of all kinds and in commercial quantities, and capable of producing large crops of any kind of deciduous fruit planted thereon, and that the crops were of the finest quality; that these representations so made as to all of the lands being sold by appellant were also made particularly as to a certain ten acre lot which appellees actually purchased; that the appellees in purchasing the lot relied solely upon these representations; that the representations were false, both as to the particular lot purchased by appellees and as to all of the lands being sold in that locality by appellant and that none of the lands so being sold, including the lot purchased by appellees were worth in excess of fifteen ($15.00) dollars per acre, as opposed to the represented value of $275.00 per acre. It being

apparent from this pleading that appellees' cause of action was barred by the limitations thereon contained in Subdivision 4 of Section 338 of the California Code of Civil Procedure, appellees attempted to complete the statement of their cause of action by alleging that they did not discover the falsity of the representations, or any of them, until January, 1928. It was also alleged that prior to this discovery, they had expended $9,757.00 in improvements upon the property, which they alleged to have been of little value because of the falsity of the representations under which the land was sold to them, and adding to these amounts a request for punitive damages in the sum of $5000.00, they prayed for a judgment in the sum of $17,007.00 as being the detriment they had suffered by the alleged fraudulent acts of appellant.

The demurrer of appellant to this pleading having been overruled, appellant answered, denying in substance the whole of the allegations concerning fraud and damage, and pleaded in addition, the Statute of Limitations above referred to. The case was tried to a jury, which rendered a verdict in favor of appellees for $1800.00, from which judgment this appeal has been taken.

The questions presented involve errors alleged to have been committed in the proceedings below, in the overruling of appellant's demurrer; in the admission of testimony over the objection and exception of appellant; in the charge of the Court to the jury; and, in the refusal of the Court to give instructions requested by appellant, all of which matters appear more fully in the Bill of Exceptions herein.

SPECIFICATION OF ERRORS RELIED ON.

(1) The Court erred in overruling appellant's demurrer to the complaint filed in the above entitled action.

(See Assignment of Errors, page 21 of Transcript, Assignment No. I.)

(2) The Court erred in denying appellant's motion for a directed verdict.

(See Assignment of Errors, page 22 of Transcript, Assignment No. III.)

(3) The Court erred in instructing the jury on the subject of the representations claimed to have been made by appellant to appellees.

(See Assignment of Errors, page 23 of Transcript, Assignment No. VI.)

(4) The Court erred in refusing to instruct the jury on the distinction between representations of fact and matters of opinion, as requested by appellant.

(See Assignment of Errors, page 35 of Transcript, Assignment No. XIV.)

(5) The Court erred in refusing to give the instruction requested by appellant regarding discovery of representations as to value.

(See Assignment of Errors, page 36 of Transcript, Assignment No. XV.)

(6) The Court erred in refusing to instruct the jury at the request of appellant concerning the effect of discovery by appellees of the falsity of any material representation made to them.

(See Assignment of Errors, page 35 of Transcript, Assignment No. XIII.)

(7) The Court erred in refusing to give Appellant's instruction No. I, upon the question of the Statute of Limitations.

(See Assignment of Errors, page 33 of Transcript, Assignment No. XII.)

(8) The Court erred in instructing the jury on the question of appellees' reliance upon the alleged representations.

(See Assignment of Errors, page 26 of Transcript, Assignment No. IX.)

(9) The Court erred in instructing the jury on the question of appellees' knowledge of the falsity of the alleged representations.

(See Assignment of Errors, page 24 of Transcript, Assignment No. VIII.)

ARGUMENT.

THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE COMPLAINT FILED IN THE ABOVE-ENTITLED ACTION.

The complaint of the appellees appears on pages 1 to 6 of the Transcript, and the demurrer thereto, interposed by appellant, appears on pages 6 and 7, and on page 8 is set forth the minute order of the Court overruling the demurrer. The demurrer was both general and special and in addition set up the Statute of Limitations. This Statute of Limitations is found in the California Code of Civil Procedure,

being Subdivision 4 of Section 338 thereof, and reading as follows:

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:
>
> *Within three years:*
>
> An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud or mistake."

In the case of *Sacramento Suburban Fruit Lands Company v. Melin,* No. 5671, pending on appeal in this Court, is a full discussion of the rules of law applicable to cases of fraud brought more than three years after the accrual of the cause of action, together with a full citation of authorities upon which appellant relies herein. For the sake of brevity we will not repeat in extenso the arguments and authorities advanced therein and quoted, but will state briefly the propositions we wish to advance in support herein of our claim that the Court erred in overruling appellant's demurrer.

The following statement of the rule as applied to the matter of pleading is taken practically verbatim from the opinion rendered by the California Supreme Court in the case of *Lady Washington Consolidated Company v. Wood,* reported in 113 Cal., 486:

The right of a plaintiff to invoke the aid of a Court for relief against fraud after the expiration of three years from the time the fraud was committed is an exception from the general statute on that subject

and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. *This is an element of the plaintiff's right of action and must be affirmatively pleaded by him in order to authorize the Court to entertain his complaint.* "Discovery" and "knowledge" are not convertible terms and whether there has been a discovery of the facts constituting the fraud, within the meaning of the statute of limitations, is a question of law to be determined by the Court from the facts stated. It is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, as that they were done in secret or were kept concealed; and he must show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the Court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of these facts.

Testing the complaint filed herein, we find the only attempt made by appellees to bring themselves within the rules of pleading above stated is found in paragraph IX of said complaint, wherein it is alleged, "that plaintiffs did not discover the falsity of said representations, or any of them, until January, 1928." The complaint states nothing whatever in addition to the above quoted words upon this matter.

Referring again to the *Lady Washington* case above cited, we quote the following from the opinion therein as particularly applicable to the situation presented in the case at bar:

> "Testing the complaint herein by these rules, it falls far short of showing that the plaintiff is within the exception to the statute, or that its cause of action is not within the apparent bar of the statute * * * It was necessary for the plaintiff to allege not only the facts constituting this fraud, but also the facts connected with its discovery, so that it might appear from the complaint that the action was not barred by the statute of limitations. The only averment by the plaintiff in this respect is that 'it was not informed of and did not know or discover any of the aforesaid frauds, or the facts connected therewith until within six months preceding the filing of the complaint herein.' It is not averred that any of these facts, or of the transactions set forth as constituting the fraud, were done secretly, or were concealed from the plaintiff, or that any information which it sought was refused, or that, indeed, it sought to obtain any information upon the subject."

A clearer case of insufficiency of pleading could scarcely be made out. The complaint stands as though the same contained no allegation whatsoever as to the

discovery of the fraud, for under the authority above cited, the allegation of non-discovery standing alone is but the allegation of a conclusion of law and not an allegation of fact and hence adds nothing to the complaint.

Though appellees were remiss in not properly pleading this matter, attention to the insufficiency of their pleading was directed by the special demurrer interposed by appellant, who demurred that the complaint was uncertain in that it did not appear therefrom what facts were discovered by plaintiffs in January, 1928, or thereafter from the discovery of which plaintiffs allege that they became informed of the alleged falsity of the representations. We will later discuss the matter of the statute of limitations in connection with the instructions given upon the subject by the Court, and in connection with instructions requested by appellant and refused by the Court, and in connection with the denial of the Court of appellant's motion for directed verdict directed at the same matter. It is herein presented purely as a proposition of pleading and we respectfully submit that the demurrer pointed out a fatal defect in the complaint steadily insisted upon, and that the error in its overruling necessitates a reversal of judgment.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT.

We next discuss the matter of the Court's denial of appellant's motion for a directed verdict. The

grounds for the motion appear on page 22 of the transcript.

(1) Among other things, the motion was directed to the insufficiency of the evidence, to show that the cause of action sued upon was not barred by the statute of limitations. As we have said heretofore, there appears in the brief filed herein by appellant in the case of *Sacramento Suburban Fruit Lands Company v. Melin,* No. 5671, a full discussion of the rules of law applicable to this matter, both as to the requisite of pleading and as to the requisite of proof, and we will not repeat herein what is there said, except to state these rules and cite some of the authorities therein quoted from. We assert in the beginning, that where the transactions complained of occurred more than three years prior to the commencement of the action, it becomes the burden of the plaintiff, not only to allege the facts bringing the case within the exception to the general rule, that is the facts involved in the discovery of the cause of action, but it is likewise his burden throughout the trial to prove by the evidence that his cause of action is not so barred. It is important, we submit, that this matter of the burden of proof be borne in mind. Ordinarily, the statute of limitations is a defense waived unless asserted. But the provisions of the statute allowing an action to be commenced, in cases of fraud, more than three years after the cause of action arose, is an exception to the general rule and being such wherever it is necessary for a plaintiff to bring actions within that exception, he is upon well understood principles, held to assume, and he must bear, the burden both of

pleading and evidence, to show that he is within the exception. As a bald allegation in the pleading alleging non-discovery until a date within the three years period is totally insufficient, is a mere conclusion of law and does not aid the pleading; so, testimony to the same effect is not testimony as to a fact, and proves nothing.

Turning to the evidence introduced upon this matter, we find that the sole testimony of appellee, H. A. Lindquist, upon the matter appears on page 46 of the transcript. It is brief, and we quote it as follows:

> "I did not find out before 1927 that that land was not fruit land, nor that it was not worth two hundred seventy-five dollars an acre. Before 1927 nobody told me that that was not fruit land there, nor that it was not worth two hundred seventy-five dollars an acre."

Concerning the matter of his investigation as to the truth or falsity of the representations made to him, he said:

> "I did not talk with any of my neighbors there about the soil nor about the land. I saw fruit orchards in another district there, but not where my lot was."
>
> (Transcript page 45.)

On page 41 of the transcript, he said:

> "I did not find out how thick the hardpan was until I dug the well pit in the fall of 1926. The hardpan went down sixteen feet."

His co-appellee and wife, Selma A. Lindquist gave likewise meagre testimony upon this matter. She said, (Transcript page 48):

> "I did not find out before 1927 that that land was not adapted to raising fruit. Nobody ever told us it was not * * * We never heard from anybody that it was not worth two hundred seventy-five dollars an acre. People thought we did not pay much. The others paid more."

The case then stands upon this matter that appellees gave no testimony whatever concerning discovery, save their bald statement of the legal conclusion that they did not discover the fraud until within the three year period. But, more than this, appellee, H. A. Lindquist, says he never made any investigation whatsoever upon the matter. These people lived on the land for six years and four months before they filed their action, and if their conclusion above quoted be true, lived upon the property and made the usual and customary use thereof for five years before they discovered the falsity of the representations as they now seek to prove them to be. It was not necessary for Lindquist to testify that he made no effort, for it is apparent that if he had made any effort to discover the falsity of the alleged representations made to him, he could not have failed to discover the falsity of such representations within an hour after making his investigation.

Let us consider first the matter of the adaptability of the land to fruit. He had eighteen inches of soil over sixteen feet of hardpan, if his testimony is to be taken as true. (Transcript pages 40 and 41.) He discovered the depth of the top soil six years and four months before he commenced his action. Had he asked anyone qualified to tell him, he would have been told

undoubtedly either that this soil depth was insufficient or that it depended upon the thickness of the hardpan under it. Well pits from which he could have discovered the thickness of this layer of hardpan were all about him, just as he did discover it in 1926 when he dug his own well pit. Having furnished that information he would then have been told by any qualified person all that he subsequently claims to have learned.

The case is even stronger upon the representations as to value. He alleges that the value of his land is fifteen dollars per acre and in addition that none of the thousands of acres of land surrounding him is worth more than that, although all of it was represented to him to be worth $275.00 an acre, about sixteen times more than he alleges it to have been actually worth. Such a glaring discrepancy could not have remained undetected had he asked any qualified person the simple question, "What is my land worth?" And had he asked such question and received the information which he claims to have discovered in 1927, to-wit, that his land was worth but fifteen dollars per acre, definite legal results would have followed: He would have known he had a cause of action for fraud and deceit, and would have known the extent of his damage, for the represented value equalled the price paid, and he was damaged for the difference between the actual value and the represented value, or purchase price. The statute of limitations would begin to run immediately as to his cause of action, and further, he would have immediately been put upon notice that he had been falsified to also in respect to the

adaptability of his land to fruit culture, for it is the law that if a man discovers, or should have discovered with reasonable diligence, that one material representation upon which he had bought was false, he is immediately put upon notice as to the falsity of any other material representation made to him in the matter.

> "Where a party to a contract ascertains that the other party has falsely represented one material matter in the transaction, it is notice to him that the representations as to other matters may also be false, and it is therefore incumbent upon him to thereafter make a full investigation as to the truth or falsity of all such matters."
>
> *Gratz v. Schuler,* 25 Cal. App., 122;
>
> *Ruhl v. Mott,* 120 Cal., 668;
>
> *Bacon v. Soule,* 19 Cal. App., 428.

In this case, we hold this proposition to be self-evident from a consideration of the testimony of the appellees, that had they made the slightest investigation upon moving upon their property, at which time, of course, every opportunity was open to them, and nothing could have been concealed, they would immediately have discovered everything which they claim to have discovered five years later. They made no investigation whatever, or if they did, must be held to have falsified in their testimony about it, because they could not make an investigation and not discover, and, therefore, could not make an investigation and claim in their testimony they had not made a discovery.

Therefore, their cause of action was barred, and the evidence was totally insufficient to support the

implied finding of the jury that their suit was not too late.

We desire to quote from *Montgomery v. Peterson,* 27 Cal. App., 675, upon this matter:

> "But passing this point, together with the more serious question of whether or not the complaint shows a sufficient excuse why a discovery of the fraud was not made within three years, we think that the evidence in the case fails utterly to sustain the finding of the Court in favor of the plaintiffs in that regard. Subdivision 4 of Section 338 of the Code of Civil Procedure, provides that in the case of fraud or mistake the action must be commenced within three years after the discovery by the aggrieved party of the facts constituting fraud or mistake. Under the cases in this state it is not enough to assert that the discovery was not sooner made. *It must appear that it could not have been made by the exercise of reasonable diligence; and all that reasonable diligence would have disclosed plaintiff is presumed to have known, means of knowledge in such a case being the equivalent of the knowledge which it would have produced.*
>
> (*Truett v. Onderdonk,* 120 Cal. 581, 588, (53. Pac. 26); *Lady Washington Co. v. Wood,* 113 Cal. 482, 486, (45 Pac. 809); *Del Campo v. Camarillo,* 154 Cal. 647, (98 Pac. 1049); See, also, *Wood v. Carpenter,* 101 U. S. 135, 140, (25 L. Ed. 807))."

Appellees knew that they had bought this property in implicit reliance upon statements in respect to the quality and value thereof made to them by the adverse party in interest, the seller. They are people of common and ordinary intelligence; Lindquist was forty-six years old; they knew, then, that in so relying, they had done something which, although warranted, was contrary to the ordinary and usual course of prudent

buyers. Conscious of this fact, they moved upon the property and were immediately presented with every possible avenue of information. Nothing was, or could have been, concealed from them. It was then their plain duty to investigate. Investigation would have disclosed; therefore, when they moved upon the property they were charged with knowledge, and the statute of limitations began to run against their cause of action whether they had actual knowledge or not.

In the case of *Sacramento Suburban Fruit Lands Company v. Melin*, pending on appeal in this Court and numbered 5671, appears a full discussion, with copious citations of authorities in respect of these matters we are now discussing. We will not burden the Court with a repetition here, but the language of the California Supreme Court in the case of *Johnston v. Kitchin,* 265 Pac., 941, is so apt upon the proposition that the representation as to value was not and could not have been concealed as regards its truth or falsity, that we quote the following from it:

> "What secret, may we ask, could be suppressed that would or could affect the value of a commercial city lot, the title to which is a public record and its value an open matter of investigation to the entire public? We know of none and think in a practical sense none can exist."

When appellees moved upon this property, therefore, they were charged with knowledge, because:

> "If the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."
>
> *Angel,* Lim. Sec. 187.

We submit that the appellees' cause of action was barred as a matter of law; that they failed to sustain the burden of proof which was theirs; that the bar of the statute had intervened and therefore, that the trial Court erred in refusing to grant appellant's motion for a directed verdict based upon that ground.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE SUBJECT OF THE REPRESENTATIONS CLAIMED TO HAVE BEEN MADE BY APPELLANT TO APPELLEES.

(a) The charge of the Court upon the subject of representations appears on pages 23 and 24 of the transcript. We submit that the Court erred in instructing the jury in effect that all the statements in appellant's booklet applied to the lot purchased by the appellees. Appellant was engaged in marketing a large tract of land, containing originally 12 thousand acres. The booklet introduced in evidence and issued by appellant (being Plaintiffs' Exhibit No. I) was one containing general staatements only, no mention being made of any particular tract. The charge of the Court was, of course, concerned solely with the lot purchased by appellees, for it was immaterial to Court and jury what representations may have been made, except as they were applicable to the lot purchased. The Court told the jury that the statements in the booklet did apply to the lot selected by appellees and that as to that lot it made the representations which it was in the complaint charged with having made, leaving to the jury only the question of their falsity. But the booklet informed appellees,

when fairly construed, that the quality of the soil in the various lots, particularly the hardpan or subsoil, varied, and likewise that its adaptability to fruit culture varied. For instance, on page 5 of the booklet, appellees were told that a variety of trees, under varying conditions, had already been planted in the district, and that as a result, appellant knew what fruits were best adapted to the various tracts of land and what fruits were adapted to the tract as a whole. Again, on page 20 of the booklet, the purchasers were advised to select one or two kinds of fruit to which their particular tract might be best adapted. Again, on page 22 of the booklet, the purchasers were advised of the existence of the impacted strata in the subsoil, and that it varied in texture and character to such an extent that blasting was sometimes required to shatter this subsoil to secure drainage and freedom for tree roots. They were told expressly that these conditions varied and that advice would be given them as to the treatment each individual tract required.

We submit that under a fair interpretation of this booklet, it was a question for the jury as to whether or not general statements as to the adaptability of the land for fruit culture could have been understood by the appellees to apply to their particular tract, and that, therefore, whether or not these representations were made should have been left to the jury, and that the Court was in error in taking that matter from the jury.

(b) The Court charged the jury (Transcript page 24) in effect that the representation as to value likewise had been made, for the Court stated appellees

and a brother had testified that Amblad, the salesman, had told them the land was worth $275.00 per acre and that Amblad had not denied it. But, this instruction ignores the proposition that under the facts and circumstances under which the statements may be assumed to have been made, it was a question for the jury to determine whether or not this was a representation of fact or a statement of opinion only. We submit that it was for the jury to determine this, and that it was error for the Court to tell them that it was a representation of fact.

It is the rule that even positive statements as to value are generally mere expressions of opinion, and as such cannot support an action of deceit. (*Kimber v. Young,* 137 Fed. 744.) The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell. All men know this, and a buyer has no right to rely upon such statement. (*Kimball v. Bangs,* 144 Mass. 321.)

(c) We submit the Court likewise erred in stating, with respect to the land of appellees, that appellant had in its booklet told them, "Moreover, it states in this book that it is proven beyond a doubt. Nothing stronger can be said than that, gentlemen, that it is proven beyond a doubt that this land is adapted to commercial orcharding." (Transcript page 135.)

The expression referred to by the Court in the above quoted portion of its charge was taken from a letter published in the booklet, signed by a Mr. Brosius. The letter referred to the Rio Linda District and purported to be a general statement concerning the entire

district. In the face of the information as to the variability of the land in respect of its quality and its adaptability to the growth of the different kinds of fruit, we submit that the quoted portion of the Court's charge viewed in respect of its particular application of appellees' land, was not warranted.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DISTINCTION BETWEEN REPRESENTATIONS OF FACT AND MATTERS OF OPINION, AS REQUESTED BY APPELLANT.

Appellant requested the Court to instruct the jury as follows:

> "You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit."

As we have heretofore pointed out it was a question for the jury to determine whether or not the representations in respect to value, which were alleged to have been made, were in fact representations or matters of opinion only. The Court should, therefore, have given the jury the benefit of the instruction requested in order that the jury might have in mind and so consider the proposition of whether or not the statements of value alleged to have been made amounted only to matters of opinion.

THE COURT ERRED IN REFUSING TO GIVE THE INSTRUCTION REQUESTED BY APPELLANT REGARDING DISCOVERY OF THE REPRESENTATIONS AS TO VALUE.

Appellant requested the Court to instruct the jury as follows:

> "You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant."

On pages 141 to 143 of the transcript there appears the instructions given by the Court concerning the matter of discovery of fraud. A reading of it will disclose that nowhere did the Court instruct the jury that there was any duty cast upon appellees to exercise any diligence whatever in discovering the fraud they claimed had been practiced upon them. The uttermost the Court went in that direction was to tell the jury that if they did in fact discover they were defrauded, or did in fact discover facts sufficient to put them on notice, then their suit was too late if filed more than three years after such discovery. That was not enough to state their duty under the law, as we have hereinbefore asserted. And, although the Court discussed the matter of discovery as to the falsity of representations pertaining to quality and character of the soil, it utterly failed to discuss the question of discovery of falsity of value representations. Under the authorities we have hereinbefore quoted, the instruction requested was a correct statement of the law. The use of diligence was required.

The jury should have been so instructed, but upon this question of discovery of falsity in the value representations claimed to have been made, the Court instead of telling the jury that plaintiff was required to exercise due diligence to make the discovery, and that if due diligence would have brought about the discovery he is charged with knowledge, told the jury in effect that if he did not have actual knowledge on this matter before February 6, 1925, three years before he commenced his action, his suit was on time. Of course, if appellees knew the falsity or were chargeable with knowledge of the falsity in respect to the representation as to value, then they knew of the existence of their cause of action and the statute would start running, and it was not necessary that they should then know of the falsity of other representations upon which they may have relied. Far from requiring any diligence of appellees, the Court told the jury, "He is not obliged to employ an expert to tell him about it. If, believing the representations in the first place, and he then relied on the further representations allaying his suspicions, he is not bound by the limit of time until he makes the actual discovery." The Court was here referring to some testimony that when appellees discovered the hardpan, an agent of appellant had told them it was not objectionable, but nothing was ever said to them by the appellant or its agent concerning the matter of value, so the Court here in effect told the jury that appellees were not bound by the limit of time until they made actual discovery. This was clearly erroneous. Again, the Court said: "If you do not find

from the greater weight of the evidence that the plaintiff had knowledge before February 6, 1925, or had notice of such facts that with reasonable inquiry they should have had knowledge, then their suit is in time." This excludes all idea of the duty of appellees to exercise any diligence whatsoever in discovering fraud after they had moved upon the property and the most ample means of information lay ready at hand.

THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S INSTRUCTION NO. I UPON THE QUESTION OF THE STATUTE OF LIMITATIONS.

The instruction requested by appellant in this connection appears on pages 33 and 34 of the transcript. This instruction does concern itself with the questions of reasonable diligence in discovery of fraud which we assert the law requires of appellees under these circumstances. Our authority for this assertion has been hereinbefore fully discussed in this brief, and even more fully discussed in the brief filed in the *Melin* case hereinbefore referred to. It is, to our minds, clearly decided by innumerable decisions of the Appellate Courts of the land that after a bargainer has bought without investigation and in express reliance upon statements of the seller concerning the property which is the subject of sale, and when after such purchase seasonable opportunity is given to him to determine the truth of these representations, he has so expressly relied upon, that there arises a consequent duty to exercise reasonable diligence to detect whether or not there may have been falsity in the

statements made to him. What possible meaning can be given to the consistent use of this word "diligence" by our Courts, except that it means an effort to be made to search out the truth of the seller's statements. All men everywhere are required by the law to exercise diligence in respect of their rights. Our Courts have frequently and definitely held that where in the making of the bargain full and fair opportunity of testing the truth of the seller's assertions are open to the buyer he must embrace them and if he does not, cannot be heard to claim that he relied upon the untested statements and was by them deceived. If under proper circumstances, the buyer is entitled to rely, and being so entitled does rely upon the seller's statements, nevertheless when opportunity is thereafter presented to him to test the truth of these statements, it is his duty then to embrace it and under such circumstances if he fails to do so he is not aided by his sloth, for if reasonable diligence in testing the truth of the statements would have disclosed the falsity of the same, then he is charged with the knowledge that would then have thus been his, and the statute of limitations begins to run against his cause of action. This is all that the requested instruction was designed to inform the jury. Not only in this case, but in the twenty-four companion cases tried by the same Court and the same judge, and presenting the question of limitations of actions, this same instruction was requested and always refused. As we have pointed out, the matter therein contained was not included within the charge of the Court, and that matter, to wit, the duty of appellees to exercise diligence

and to test the truth of the statements that they had relied upon when they moved upon the land and were possessed of the full opportunity to do so, was nowhere laid before the jury. Rather the Court sought in each case to pardon the appellees their patent failure in this regard.

THE COURT ERRED IN INSTRUCTING THE JURY UPON THE QUESTION OF APPELLEES' RELIANCE UPON THE ALLEGED REPRESENTATIONS.

On pages 26, 27 and 28 of the transcript appears an instruction given by the Court and excepted to by the appellant, (Transcript page 145), touching upon the question of appellees' belief in the alleged representations and their reliance thereon. This instruction is objectionable as being not so much an instruction by the Court, or a commenting by the Court upon the evidence, as an argument by the Court in favor of appellees.

For instance, the Court said therein:

> "Did the plaintiffs believe them? They say they did. They were Minnesotans; they knew nothing about California or California fruit, from the practical side, never having been here. All the knowledge they had they got from defendant's literature, and talking with their neighbors, so they say. * * * He finally told them on the 29th of September, if you don't buy before October 1st the land is going up in price. That appealed to their sense of thrift, and they did sign the contract that night. * * * Ask yourselves, what does California stand for in the east, what its trademark is other than climate and fruit. I want to say right here, gentlemen of the jury, that the law presumes that all transactions are

> fair and honest until that presumption is overcome by the evidence in the case. But the resources of California and the state are great enough that they need no false representations to sell them abroad. It is not good for the state. I am not saying there were any. That is left for you. You must not get the idea into your head that just because you are Californians you must uphold the credit of the state and the value of its lands by thinking that that was ordinary puffing for the selling of land, if they were false. * * * You cannot induce any man to enter into a bargain by false statements and escape liability."

With all respect to the learned judge who so addressed the jury in this connection, it is difficult for use to believe that the judicial temperament was not influenced and the judicial utterances were not colored by strong belief on the part of the Court that a verdict should have been rendered in favor of the appellees. And, we respectfully suggest that whether or not the Court did so depart from judicial standards, the effect upon the jury could only have been a belief on their part that the Court desired them to bring in a judgment against the appellant. May we not respectfully suggest that the language we have above quoted is argument and not comment? Does it not use the language of special pleading? Was it necessary in commenting upon the evidence to the jury that it should be warned against being swayed by state pride, that they should be told of what was not good for the state? We submit that herein the trial Court exceeded the bounds of proper comment upon evidence and fell into the error of making an argument against the cause of the appellant. The argu-

ment of appellees' counsel might have been more trenchantly phrased but would have lacked the force and prestige of the remarks from the bench.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF APPELLEES' KNOWLEDGE OF THE FALSITY OF THE ALLEGED REPRESENTATIONS.

The Court gave an instruction to the jury concerning the question of appellees' knowledge of the falsity of the statements it was alleged to have made to appellees. The same appears on pages 25 and 26 of the transcript. It was duly excepted to. (Transcript page 145.) We will not repeat this instruction here, but will ask the Court to give its attention thereto. Here again, we respectfully submit that the learned trial Court exceeded the bounds of proper comment and entered into the field of argument. We believe the jury were by these remarks of the Court left in a state of mind such that there was in their opinion no question but what the appellant had full knowledge of the falsity of the representations made when it made them, and we believe this was particularly injurious because there was throughout the case the question of whether or not the representations were matters of fact or matters of opinion only. The minds of men have differed markedly not only on questions as to value of real property contiguous to a populous city, but also as to adaptability of various kinds of soil to the growth of fruits. The wisdom of yesterday has frequently been proven false by the later wisdom of today. What was commercially profitable

fruit culture in 1921 when these lands were sold would have driven the orchardist to insolvency in 1928, when this case was tried. These things cannot be eradicated from the minds of the jury. They do not possess the capacity which trained jurists possess. They try all cases as of the date when the evidence is introduced before them. It is a well known fact that the orchard industry of California was when this case was tried, and still is, in most precarious circumstances. Insolvency has overtaken a great percentage of the orchardists in our state and is closely pursuing the rest. This jury knew this. As a corollary, land less adapted to commercial orcharding than the best lands of our state, first feel the pinch of falling price. And likewise, lands adapted to commercial orcharding in 1921 have by the general fall of prices, and increase of expense, been eliminated from that class.

We submit that the instruction complained of should not have been given.

We ask that the judgment be reversed.

Respectfully submitted,

BUTLER, VAN DYKE & DESMOND,

EDWARD P. KELLY,

Attorneys for Appellant.

No. 5703

IN THE

United States Circuit Court of Appeals

For the Ninth District

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a corporation,

Appellant,

vs.

H. A. LINDQUIST and SELMA A. LINDQUIST.

Apellees

BRIEF OF APPELLEES

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TABLE OF AUTHORITIES CITED

SUBJECT INDEX

No. 5703

IN THE

United States Circuit Court of Appeals

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SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a corporation,

Appellant,

vs.

H. A. LINDQUIST and SELMA A. LINDQUIST.

Appellees.

BRIEF OF APPELLEES.

The facts in this case are similar to the other cases. The general facts relating to the statute of limitations are substantially the same as those existing in the Melin case, No. 5671, and the same arguments relative thereto are equally applicable to this case.

I.

WHETHER OR NOT THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE COMPLAINT FILED IN THE ABOVE-ENTITLED ACTION.

(a) There was no exception taken to the order overruling demurrer (Transcript, page 8). This point is not available in the absence of such exception.

Melin brief, page 3.

(b) The complaint is sufficient in that it alleges non-residence of appellant. This is a sufficient plea, and being such, appellant cannot take advantage of the statute.

Melin brief, page 4.

II.

WHETHER OR NOT THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT.

(a) The same situation exists here as existed in the other cases, as to the statute of limitations. Appellant is a foreign corporation, non-resident of the state and the question of the statute of limitations is not involved.

O'Brien vs. *Big Casino Gold Min. Co.* 9 Cal. 283; 99 Pac. 209.

Point IV. Melin Brief, page 9.

(b) The statute of limitations did not as a matter of fact run.

As we pointed out in the Melin brief, page 9, the appellee, H. A. Lindquist was a cabinet maker, and the other appellee was his wife. In 1921 they lived at St. Paul, Minnesota; had never been to California; knew nothing about the character, quality or value of California lands. They were given one of the booklets "Poultry Farms and Orchard Homes," the subject matter in which is outlined in *Sacramento Suburban Fruit Lands Co.* vs. *Elm*, 29 Fed. (2d) 233. The company's agents, together with the booklet described the lands to them, and they thereafter, and on the same day, signed a contract to purchase. They remained in Minnesota until February, 1922, at which time they came to California

and moved upon the land, built their house and discovered hardpan. Mr. McNaughton, the horticulturalist of appellant came around and explained to appellees that hard-pan was something very good for fruit when it was blasted; that it contained lime and potash which the trees needed. Appellees did not discover how thick the hardpan was until they dug their well pit in the fall of 1926. They then discovered that the hardpan was 16 feet in thickness. In 1924 they planted some trees, and in 1925 some more. They cared for them and in 1927 thirty-five died. Appellee, H. A. Lindquist began to work in the Southern Pacific shops as a cabinet maker after he came here. They had no immediate neighbors, but were living in the district. They began their action on the 6th day of February, 1928.

We think that appellees were excused from discovering the falsity of the representations between the 23rd day of February, 1922 and the 6th day of February, 1925, by their ignorance of farming, fruit raising and soil; by their ignorance of California conditions; by the difficulties incumbent upon ascertaining the facts; the land lying in a large district similarly situated; their being under the dominance of appellant and its supposed experts; the false statements made by McNaughton calculated to continue them in ignorance and dispel suspicion, and the fact that the matter was one difficult of ascertainment, as will appear by the fact that appellant appeared at the trial with experts endeavoring to prove that the representations were not false.

Under the authorities cited in the Melin brief, No. 5671, pages 9 et seq, we respectfully submit that there

was nothing in the present case which would require appellees to investigate the question as to whether or not they had been defrauded. Particularly do we call the court's attention to

> *MacMahon* vs. *Grimes*, 275 Pac. 440 at 445, and *Nichols* vs. *Moore*, 181 Cal. 131

where the true rule is stated concerning the duty of a defrauded party to investigate.

III.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY ON THE SUBJECT OF THE REPRESENTATIONS CLAIMED TO HAVE BEEN MADE BY APPELLANT TO APPELLEES.

(a) The only exception to the court's instructions in the above regard is as follows:

> "We except to the charge as a whole; and particularly, to the instructions on the subject of representations claimed to have been made by defendant to plaintiff, both as to the growing of fruit, and as to the question of value." (Transcript, page 145.)

As we pointed out in the Melin Brief, page 19, the foregoing exception is inadequate.

(b) The booklet was properly interpreted by the Court as we also pointed out in the Melin case at page 27 of the brief.

(c) Appellant then branches off into an argument as to whether or not a representation of value is a representation of fact or a matter of opinion. Under the cases cited in the Melin brief at page 6, et seq., and particularly the case of *Harris* vs. *Miller*, 196 Cal. 8 at

13, representations of value are representations of fact under the circumstances of this case, as a matter of law.

(d) The argument made under this sub-head concerning the court's statement that the book says that it is proven beyond a doubt that the lands are fruit lands is without any legal foundation. The book did make that statement as has been so often pointed out.

IV.

WHETHER OR NOT THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DISTINCTION BETWEEN REPRESENTATIONS OF FACT AND MATTERS OF OPINION, AS REQUESTED BY APPELLANT.

(a) The only exception to this is found as follows:

> "Also to the failure of the court to give defendant's proposed instruction No. 4, concerning distinctions between representations and matters of opinion." (Transcript, page 145.)

As we pointed out in the Melin brief, page 19, this method of excepting is insufficient.

Alaska S. Co. vs. *Katzeek,* 16 Fed. (2d) 210.
Killisnoo Pac. Co. vs. *Scott,* 14 Fed. (2d) 86.

(b) All of the arguments under this head beginning with paragraph III, subdivision (c) page 6 et seq of the Melin brief, No. 5671, are equally applicable here. We respectfully request that our arguments there may be considered in this case.

V.

WHETHER OR NOT THE COURT ERRED IN

REFUSING TO GIVE THE INSTRUCTION REQUESTED BY APPELLANT REGARDING DISCOVERY OF THE REPRESENTATIONS AS TO VALUE.

(a) The only exception to this point is as follows:

> "Also to the failure of the Court to give defendant's proposed Instruction No. 5, concerning the effect of plaintiffs having been able by reasonable diligence to discover the alleged falsity of representations as to value." (Transcript, page 145.)

As we pointed out in the Melin Brief, page 19, such an exception is insufficient.

(b) The court fully instructed the jury in this regard. Beginning with page 141 of the Transcript and ending at the bottom of page 144, the court fully covered this subject.

(c) This subject is also covered in the Melin brief at page 9, et seq., thereof. All of the arguments there are equally applicable here.

(d) Defendant being a non-resident corporation, the statute of limitations is not involved.

VI.

WHETHER OR NOT THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S INSTRUCTION NO. 1, UPON THE QUESTION OF THE STATUTE OF LIMITATIONS.

(a) The only exception to the failure to give this instruction is as follows:

> "We also except to the failure of the Court to

give defendant's proposed instruction No. 1, upon the matter of the statute of limitations." (Transcript, page 145.)

The exception, as we have pointed out, is insufficient.

(b) In the Melin case, page 15, of our brief, we pointed out that the defendant is a non-resident corporation and not entitled to the benefit of the act pleaded, and that the matter of the statute of limitations is not involved.

We also pointed out that the instruction offered is erroneous in that it implies that appellee is under a duty to investigate to ascertain fraud.

MacMahon vs. *Grimes,* 275 Pac. 440 at 445. 77 C. D. 356.

We submit that under the other arguments in the said *Melin* case, that the point is not well taken.

VII.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY UPON THE QUESTION OF APPELLEE'S RELIANCE UPON THE ALLEGED REPRESENTATIONS.

(a) The only exception taken to this instruction is as follows:

"Also to the instruction as to the question of belief on the part of the plaintiffs, and reliance thereon." (Transcript, page 145.)

Such an exception is not sufficient to call the court's attention to the matter argued by appellant under the above heading.

(b) The appellant here again launches out upon an

unwarranted attack upon the trial judge. All of these matters are referred to in the Melin brief, page 27, and we respectfully request that our arguments there may be considered in this regard.

VIII.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF APPELLEES' KNOWLEDGE OF THE FALSITY OF THE ALLEGED REPRESENTATIONS.

(a) The only exception to this is as follows:

> "Also to the instruction upon the subject of the knowledge of the falsity on the part of the defendant." (Transcript, page 145.)

As pointed out before, the exception is insufficient.

(b) The court's remarks in this regard were logical and fair. This same matter arose in the Melin case and is argued at page 27 of our brief therein.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

RALPH H. LEWIS
GEORGE E. McCUTCHEN
Attorneys for Appellees.

No. 5705

United States

Circuit Court of Appeals

For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

J. H. HANSON and JENNIE B. HANSON,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Northern Division of the District Court of the United States, in and for the Northern District of California.

J. H. HANSON and JENNIE B. HANSON,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

COMPLAINT.

Plaintiffs complaining allege:

I.

That defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That plaintiffs are citizens and residents of the State of California; that defendant is a resident of the State of Minnesota and the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

That on and prior to the first day of November, 1921, plaintiffs were residing in Minneapolis, Minnesota, were wholly unfamiliar with California farm and fruit lands, the nature, quality and values thereof and in all the negotiations hereinafter referred to were compelled to rely, and did rely, entirely upon the statements and representations of defendant with respect thereto.

IV.

That defendant well knew of the unfamiliarity of plaintiffs with each of the matters and things contained in the representations hereinafter set forth and with intent to cheat [1*] and defraud plaintiffs by inducing them to enter into the contract hereinafter referred to falsely and fraudulently stated and represented to plaintiffs that all of the 10-acre tracts of land in the County of Sacramento, State of California, then being sold by defendant were, and particularly that that certain real property in the County of Sacramento, State of California, described as Lot No. 22 of Rio Linda Subdivision No. 5 as per the official map or plat thereof on file and of record in the Office of the Recorder

*Page-number appearing at the foot of page of original certified Transcript of Record.

of the County of Sacramento, State of California, was of the fair and reasonable value of $275.00 per acre; that all of the land thereof was rich and fertile and was capable of producing all sorts of farm crops and products; that said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that said land was perfectly adapted to the raising of fruits of all kinds in commercial quantities; that said land was capable of producing large crops of any kind of deciduous fruit planted thereon; and that said crops were of the finest quality.

V.

That plaintiffs relied solely upon said representations, and each of them, and believed the same to be true and solely by reason thereof entered into a contract with defendant on or about said first day of November, 1921, whereby defendant agreed to sell and plaintiffs agreed to purchase the 10-acre tract of land above described at a price of $2,750.00.

VI.

That plaintiffs paid $550.00 down at or about the time of the execution of said contract and well and faithfully did and performed all the terms, covenants and conditions thereof [2] on their part to be performed. That on or about the first day of February, 1925, defendant conveyed said lands to plaintiffs and in payment of the balance of the purchase price thereof plaintiffs executed and delivered to defendant two promissory notes and secured the same by deeds of trust upon said real property. That the first of said deeds of

trust was to J. W. S. Butler, and B. F. Van Dyke, trustees of the F. A. Bean Foundation, Inc., a corporation, and secured a note for $1,000.00, payable to said F. A. Bean Foundation, Inc., a corporation. That the second of said deeds of trust was to said J. W. S. Butler and B. F. Van Dyke, trustees of defendant, and secured a note made payable to defendant in the sum of $1,200.00. That plaintiffs have paid all of the interest but none of the principal upon the note secured by said first deed of trust and have paid $800.00 and all of the interest upon the note secured by said second deed of trust.

VII.

That it was not then, there, at any time, or at all true that said land above described, or any of said parcels of land, were, or was, of the value of $275.00 per acre, or that any portion thereof was worth in excess of $50.00 per acre and/or that any of said land was fertile and/or that said land would produce any crops in commercial quantities and/or was at all adapted to the growing of fruits or fruit-trees and/or that trees of any kind would grow, thrive or flourish thereon.

VIII.

That said representations were, and each of them was, at the time of the making thereof false and untrue and were at said times known to defendant to be false and untrue and were made solely for the purpose of cheating plaintiffs out of their money by inducing them to enter into said contract and to make said [3] payments.

IX.

That plaintiffs did not discover the falsity of said representations, or any of them, until about the month of February, 1928, and prior thereto and because of their reliance thereon plaintiffs expended moneys in the improvement of said described real property and bestowed labor thereon. That in so doing plaintiffs constructed a house thereon at an expense of $1500.00, a garage at an expense of $100.00, a lean-to barn at an expense of $25.00, chicken-houses at an expense of $950.00, three brooder-houses at an expense of $420.00; dug a well and pump pit at an expense of $265.00; put up a tank-house at an expense of $100.00; installed a windmill and pump at an expense of $75.00, a water-tank at an expense of $85.00, an electric pump at an expense of $175.00, a concrete tank at an expense of $50.00, water-pipes at an expense of $150.00. That plaintiff also levelled said land for cultivation at an expense of $150.00 and fenced the same at an expense of $50.00. That each of said sums was the actual, necessary and reasonable expense of each of said items.

X.

That in making said improvements plaintiffs have expended upon said property a total sum in excess of $4,095.00 and have paid and agreed to pay for said land $2,750.00, making a total of $6,845.00. That had said property been as represented said moneys would have been properly expended thereon and said property would have been worth, with said improvements, at least $7,000.00

but by reason of the fraud and deceit of defendant, as aforesaid, and by reason of the falsity of said representations said land, as improved, is not worth in excess of $1500.00, and plaintiffs have thereby been damaged in the sum of $5,345.00. [4]

XI.

That said acts of defendant, and each of them, and defendant's whole course of conduct was unlawful, malicious, fraudulent and oppressive and a reasonable sum to be allowed plaintiffs as punitive damages therefor is $5,000.00.

WHEREFORE, plaintiffs pray judgment for $10,345.00, for plaintiffs' costs of suit and for such other and further relief as to the Court shall seem meet and proper.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

State of California,
County of Sacramento,—ss.

J. H. Hanson, being first duly sworn on oath, says he is one of the plaintiffs in the above-entitled action and that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters stated on information and belief and as to those matters he believes it to be true.

J. H. HANSON.

Subscribed and sworn to before me, this 28th day of February, 1928.

[Seal] GEORGE E. McCUTCHEN,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Feb. 29, 1928. [5]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes defendant above named and demurs to the complaint of plaintiffs on file herein, and for grounds of demurrer alleges as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this, that it cannot be ascertained therefrom why plaintiffs were compelled to rely upon the statements and representations of the defendant with respect to the property referred to in plaintiffs' complaint.

III.

That said complaint is further uncertain in this, that it does not appear therefrom what facts were discovered by plaintiffs in or about the month of February, 1928, or thereafter, from the discovery of which plaintiffs allege that they became informed of the alleged falsity of said representations; nor can it be ascertained therefrom what was the nature

or character of the work and/or labor bestowed upon said property as alleged in plaintiffs' complaint; nor can it be ascertained therefrom the quantity of labor so bestowed. [6]

IV.

That said complaint is further uncertain in this, that it cannot be ascertained therefrom whether or not plaintiffs, prior to entering into said contract, knew or were informed that the lands alleged to have been purchased from defendant were underlain with hard-pan and clay.

V.

That said complaint is further uncertain in this, that it cannot be ascertained therefrom what quantities of fruit are "commercial quantities," or what is meant by the terms "commercial quantities" as used in plaintiffs' complaint, or what is meant by the term "merchantable fruits" as used therein, or in what way, or in what particulars said lands purchased by plaintiffs were not similar to the other land alleged to have been shown to plaintiffs.

VI.

That said complaint is further uncertain in this, that it cannot be ascertained therefrom what is meant by the terms "rich and fertile" as used in plaintiffs' complaint with relation to the quality of the soil alleged to have been purchased by plaintiffs, or what is meant by the terms "conditions and things injurious or harmful to the growth of fruit-trees," or what defects in said soil rendered it unadapted to the growing of fruits or fruit-trees, or

why said soil was not adapted to the growing of fruit-trees or adapted to the growing of farm crops or products.

VII.

That said complaint is ambiguous and unintelligible for each of the reasons hereinabove given for its being uncertain.

VIII.

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof, of the [7] Code of Civil Procedure of the State of California.

WHEREFORE, defendant prays that plaintiffs take nothing by their action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 13th day of March, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Pltfs.

[Endorsed]: Filed Mar. 13, 1928. [8]

In the Northern Division of the District Court of the United States, in and for the Northern District of California.

No. 475.

J. H. HANSON and JENNIE B. HANSON,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

AMENDMENT TO COMPLAINT.

Come now the plaintiffs above named and pursuant to the annexed stipulation file this, their amendment to the complaint herein, and allege:

XII.

That after signing said contract plaintiffs continued to reside in Minnesota until October 4, 1922, and did not arrive in California until about October 25, 1922. That plaintiffs moved upon said property about November 11, 1922, and have resided thereon ever since.

XIII.

That all the lands adjoining the lands so sold by defendant to plaintiff were sold to persons formerly residing in the eastern part of the United States and unfamiliar with California lands as fruit lands of great value, and it was believed generally in the locality of said lands up to February, 1927, that

said lands were fruit lands and of the value of $350.00 per acre and upwards.

XIV.

That plaintiffs did not plant any trees until the spring of 1925, and at said time planted about thirty thereof. That said trees appeared to do well during the balance of the year 1925 but about six thereof died in the year 1926. That at the time of the death of said trees plaintiffs made inquiry concerning the same and were advised that some fruit-trees die in any [9] soil and, therefore, did not discover therefrom that said land was not well adapted to the raising of fruit. That about six more of said trees died in the year 1927, but for the same reason plaintiffs did not discover therefrom that said land was not fruit land.

XV.

That about the first day of February, 1925, defendant solicited plaintiffs to take a deed to said property and pay the balance upon said contract by executing notes therefor and securing the same by deeds of trust upon said property. That defendant conducted the whole of said negotiations, arranged the placing of said loans and all that plaintiffs did in connection therewith was to sign the necessary papers at the instance of defendant. That plaintiffs did not have any other occasion to attempt to borrow any money on said property and never discussed said property or its value with any real estate broker, salesman, banker, or either thereof, except as follows: That in the summer of 1926, plaintiffs had occasion to borrow $150.00 and

in the summer of 1927 to borrow $100.00 upon unsecured notes from the California Trust & Savings Bank. That on each of said occasions plaintiffs were asked to make a statement of their assets and did so, including therein said lands at $275.00 per acre. That said lands were not appraised and said bank did not take any exception to the valuation so placed thereon.

XVI.

That in the spring of 1927 a number of the persons who had bought adjoining lands complained that they had been defrauded and made complaints to the District Attorney of the county of Sacramento and also to the Real Estate Commissioner of the State of California. That said District Attorney conducted some sort of investigation and did not take any action concerning said matter, and said Real Estate Commissioner dismissed [10] said complaints for lack of jurisdiction. That plaintiffs only heard thereof casually and were not among said complainants and believed from the dismissal of said charges and the refusal to act thereon that said complaints were groundless and without merit.

XVII.

That plaintiffs heard nothing further thereof until they learned in the middle of the year 1927 that a number of said persons had filed suits against defendant to recover damages for deceit in the sale of such adjoining lands. That because of the previous investigation of said matter plaintiffs did not believe said suits to be well founded until they heard in the month of January, 1928, of the de-

cision in this court in the case of Charles J. Elm and Claire V. Elm vs. Sacramento Suburban Fruit Lands Company, the defendant in this case, and in the month of February, 1928, of the decision of the case of John E. Wellnitz vs. defendant in the Superior Court of the State of California in and for the County of Sacramento. That as a result thereof plaintiffs considered their land further and the fact that said trees had died and that their soil was similar to the soil on the Elm and Wellnitz places and as a result thereof discovered about February, 1928, that they had been defrauded as hereinbefore set forth.

WHEREFORE, plaintiffs pray judgment for $10,345.00, for plaintiffs' costs of suit and for such other and further relief as to the Court shall seem meet and proper.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs. [11]

State of California,
County of Sacramento,—ss.

J. H. Hanson, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action and that he has read the foregoing amendment to complaint and knows the contents thereof, and that the same is true of his knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. H. HANSON.

Subscribed and sworn to before me this 8th day of May, 1928.

[Seal] GEORGE E. McCUTCHEN,
Notary Public in and for the County of Sacramento, State of California.

It is hereby stipulated that the foregoing amendment to complaint may be filed in the above-entitled matter.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed May 14, 1928. [12]

[Title of Court and Cause.]

DEMURRER TO AMENDED COMPLAINT.

Comes now defendant above named and demurs to plaintiffs' complaint as amended, and for grounds of demurrer thereto, alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint, and said cause of action therein set forth, are and each of them is, barred by Section 338 of the Code of Civil Procedure of the State of California, and by Subdivision 4 of said Section.

WHEREFORE, defendant prays that plaintiffs take nothing by their action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 21 day of May, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 21, 1928. [13]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 11th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 11, 1928—ORDER OVERRULING DEMURRER.

The demurrer to complaint and the demurrer to the amended complaint came on regularly this day for hearing, and after argument by the counsel for the respective parties, IT IS ORDERED

that the demurrers be and the same are hereby overruled, with 20 days to answer. [14]

[Title of Court and Cause.]

ANSWER.

Now comes the defendant, and answering the complaint of plaintiffs on file herein, admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in Paragraphs I and II of plaintiff's complaint.

II.

Admits that on or prior to the month of November, 1921, plaintiffs were residing in Minneapolis, Minnesota.

Concerning the allegations in Paragraph III of plaintiffs' complaint to the effect that prior to the month of November, 1921, plaintiffs were wholly unfamiliar with California lands, their qualities, characteristics and values, and particularly with California fruit lands, defendant alleges that it has not sufficient information or belief upon or concerning said allegations to answer the same, and therefore and upon that ground it denies, both generally and specifically, each and all of said allegations.

III.

Admits that plaintiffs entered into a contract with defendant on or about November 1st, 1921,

whereby defendant agreed [15] to sell and plaintiffs to buy the real property described in Paragraph IV of plaintiffs' complaint, at the price of Two Thousand Seven Hundred Fifty ($2,750.00) Dollars.

IV.

Admits that plaintiffs paid $550.00 down at or about the time of the execution of said contract; admits that on or about February 1st, 1925, defendant conveyed said lands to plaintiffs and that plaintiffs executed at the time of said conveyance, the two deeds of trust referred to in Paragraph VI of plaintiffs' complaint; admits that the second lien deed of trust therein described secured a note made payable to defendant in the sum of $1,200.00, which note was at said time delivered to defendant, and that the first lien deed of trust described therein secured a note for $1,000.00 payable to F. A. Bean Foundation, Inc.; denies that said note made payable to F. A. Bean Foundation, Inc., was executed or delivered to defendant, but alleges that the same was executed and delivered to F. A. Bean Foundation, Inc.; admits that plaintiffs have paid the interest upon the note secured by the first deed of trust up to February 2d, 1928, and have paid none of the principal thereof, and that plaintiffs have paid all of the interest upon the note secured by said second deed of trust up to February 2d, 1928, and $725.00 upon the principal thereof, but denies that other or further payments have been made.

V.

Admits that plaintiffs constructed upon said

property a house, garage, lean-to barn, chicken-houses, brooder-houses, tank-house, windmill and pump, water-tank, electric pump and concrete tank, well and pump pit, water-pipes, and fencing.

Concerning the allegations in Paragraph IX of plaintiffs' complaint to the effect that plaintiffs constructed upon said premises [16] a house at an expense of $1,500.00, a garage at an expense of $100.00, a lean-to barn at an expense of $25.00, chicken-houses at an expense of $950.00, three brooder-houses at an expense of $420.00, dug a well and pump pit at an expense of $265.00, put up a tank-house at an expense of $100.00, installed a windmill and pump at an expense of $75.00, a water-tank at an expense of $85.00, an electric pump at an expense of $175.00, a concrete tank at an expense of $50.00, water-pipes at an expense of $150.00, and that plaintiff leveled said land for cultivation at an expense of $150.00 and fenced the same at an expense of $50.00, and that each of said sums was the actual, necessary and reasonable expense of each of said items, defendant alleges that it has not sufficient information or belief upon or concerning said allegations to answer the same, and therefore and upon that ground it denies, both generally and specifically, each and all of said allegations.

VI.

Concerning the allegations of Paragraph X of plaintiffs' complaint to the effect that in making improvements upon said property plaintiffs have expended a total sum in excess of $4,095.00, de-

fendant alleges that it has not sufficient information or belief concerning the same to enable it to answer, and for that reason and upon that ground, it denies, both generally and specifically, each and all of said allegations.

VII.

Defendant denies each and all of the allegations of plaintiffs' complaint not herinabove denied for want of information and belief, or not hereinabove expressly denied or expressly admitted.

Further answering plaintiffs' complaint, defendant alleges:

That after the execution of said contract between the plaintiffs and the defendant, and after plaintiffs had knowledge of [17] the actual condition, quality and value of said land, and its adaptability for horticultural and agricultural uses, plaintiffs became, and were, frequently in default under the terms and conditions of said contract and under the terms and conditions of said promissory note secured by the second lien deed of trust referred to in plaintiffs' complaint, and on numerous and diverse occasions, when so in default, plaintiffs applied to and received from defendant, extensions of time to make such payments so in default and requested and obtained waivers of such defaults from defendant; that at no time did plaintiffs inform defendant that they claimed to have been, or were, defrauded or deceived in the purchase of said property.

As a further defense to plaintiffs' action herein defendant alleges:

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof of the Code of Civil Procedure of the State of California.

Answering the amendment to plaintiffs' complaint on file herein, defendant admits, denies and alleges as follows, to wit:

I.

Admits the allegations of Paragraph XII of said amendment to plaintiffs' complaint.

II.

Concerning the allegations of Paragraph XIV of said amendment, defendant alleges that it has not sufficient information or belief to enable it to answer the same and for that reason and upon that ground, denies, both generally and specifically, each and all of said allegations in said amendment to plaintiffs' complaint contained. [18]

III.

Concerning the allegations in Paragraph XV of said amendment to the effect that plaintiffs did not have occasion to attempt to borrow money on said property and never discussed said property or its value with any real estate broker, salesman, banker, or either thereof, except that in the summer of 1926 plaintiffs had occasion to borrow $150.00 and $100.00 upon unsecured notes, from the California Trust and Savings Bank; that on said occasion plaintiffs made statements of their assets, including

said lands at $275 per acre, and that said lands were not appraised and said Bank did not take any exception to the values so placed thereon, defendant alleges that it has not sufficient information or belief to enable it to answer the same, and upon that ground, and for that reason, it denies, both generally and specifically, each and all of said allegations.

IV.

Admits that in the spring of 1927 a number of persons who had bought lands in the Rio Linda District complained that they had been defrauded and made complaint to the District Attorney of the County of Sacramento, and to the Real Estate Commissioner of the State of California; defendant alleges that said District Attorney conducted an investigation of said complaint and did not take action concerning the matter for the reason that from such investigation said official determined that the facts did not warrant any action being taken; admits that said real estate commissioner dismissed said complaints for lack of jurisdiction.

V.

Concerning the allegations of Paragraph XVII of said amendment, defendant alleges that it has not sufficient information or [19] belief to enable it to answer the same, and for that reason and upon that ground, denies, both generally and specifically, each and all of the said allegations.

VI.

Defendant denies each and all of the allegations contained in the said amendment to plaintiffs' complaint not hereinabove denied for want of informa-

tion or belief, or not hereinabove expressly admitted or expressly denied.

WHEREFORE, defendant prays that plaintiffs take nothing by their said action herein, and that defendant have and recover of and from plaintiffs its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

State of California,
County of Sacramento,—ss.

L. B. Schei, being duly sworn, deposes and says:

That he is an officer, to wit, the resident secretary of Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the within-entitled action; that he makes this affidavit for and on behalf of said corporation defendant; that he has read the foregoing and annexed answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to such matters he believes it to be true.

L. B. SCHEI.

Subscribed and sworn to before me, this 27 day of August, 1928.

[Seal] J. W. S. BUTLER,
Notary Public in and for the County of Sacramento, State of California. [20]

Service hereof is hereby admitted and receipt of copy acknowledged this 28 day of August, 1928.

RALPH H. LEWIS,
Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 29, 1928. [21]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Wednesday, the 17th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 17, 1928—TRIAL.

This case came on regularly this day for trial. Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiffs and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant. Thereupon the following named persons, viz.:

J. F. Cogan,	Harry S. Anderson,
C. Hair,	James S. Rogers,
A. G. George,	Jack Madden,
F. A. Mautz,	Gustav Warg,
Marshal C. Curtis,	Fred McLeod, and
Geo. H. Richards,	Geo. E. Mack,

twelve good and lawful jurors, were, after being duly examined upon their oaths, sworn to try the issues joined herein. Counsel for both sides made their opening statements to the Court and jury.

J. H. Hanson, Jennie B. Hanson, Adolph Stern, Herbert C. Davis, Howard D. Kerr and Emil Johnson were sworn and testified on behalf of the plaintiffs and plaintiffs introduced in evidence and filed exhibits marked Nos. 1, 2, 4 and 5 and the plaintiffs rested. John Posehn, Lambert Hagel, F. E. Unsworth, H. F. Bremer, Louie Terkelson, James Geddes, E. E. Amblad, Arthur Morley and F. E. Twining were sworn and testified on behalf of the defendant, and defendant introduced in evidence and filed its exhibits marked Nos. 3, 6, 7, 8, 9, 10, 11 [22] and 12 and the defendant rested. Ida E. Perra, John V. Krall and H. C. Davis were sworn and testified on behalf of the plaintiff in rebuttal, and the plaintiffs again rested. After argument by the counsel J. W. S. Butler, Esq., Attorney for the defendant, made and filed a motion for a directed verdict, which motion was ORDERED denied. After the instructions of the Court to the jury, the jury at 4:59 o'clock P. M. retired to deliberate upon their verdict. ORDERED that the jury be committed to the custody of the U. S. Marshal until such time as they shall have agreed upon a verdict. The verdict shall be signed by the foreman and sealed in an envelope and kept in the custody of the foreman, and the jury shall report its verdict to the Court on Thursday, October 18th, 1928, at ten o'clock A. M. [23]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Thursday, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 18, 1928—TRIAL (RESUMED).

The parties hereto and the jury impaneled being present as heretofore the trial was thereupon resumed. The jury was thereupon asked if they had agreed upon a verdict and through their foreman answered in the affirmative, and thereupon presented a sealed verdict which was opened in the presence of the jury and read and which verdict was ORDERED recorded as follows, viz.:

"We, the jury, find in favor of the plaintiffs and against the defendant and assess the plaintiffs' damages at $2,000.00.

Dated: October 17, 1928.

HARRY S. SANDERSON,
Foreman."

and the jury being asked if said verdict is their verdict, each juror replied that it is. ORDERED

judgment be entered herein in accordance with said verdict and for costs. ORDERED that jurors Geo. H. Richards and Geo. E. Mack be excused until Tuesday, November 13th, 1928, at 10 o'clock A. M. FURTHER ORDERED that all other jurors in attendance this day be excused from further attendance upon this court. [24]

[Title of Court and Cause.]

VERDICT.

We, the jury, find in favor of the plaintiffs and against the defendant and assess the plaintiffs' damages at $2,000.00.

HARRY S. SANDERSON,
Foreman.

Dated: October 17, 1928.

[Endorsed]: Filed at 10 o'clock A. M., October 18, 1928. [25]

In the Northern Division of the United States District Court for the Northern District of California.

No. 475—LAW.

H. J. HANSON and JENNIE B. HANSON,
Plaintiffs,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,
Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 17th day of October, 1928, being a day in the October, 1928, Term of said Northern Division of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiffs and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with on the 17th and 18th days of October, 1928, in said Term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury, the jury having subsequently rendered the following verdict, which was ORDERED recorded, to wit:

"We, the jury, find in favor of the plaintiffs and against the defendant and assess the plaintiffs' damages at $2000.00.

Dated October 17th, 1928.

HARRY S. SANDERSON,
Foreman."

and the Court having ORDERED that judgment be entered in accordance with said verdict:

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,— [26]

IT IS ORDERED AND ADJUDGED that the plaintiffs, J. H. Hanson and Jennie B. Hanson, do

have and recover of and from the defendant Sacramento Suburban Fruit Lands Company, a corporation, the sum of Two *Hundred* ($2,000.00) Dollars, and for costs taxed at $33.15.

Judgment entered this 18th day of October, 1928.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [27]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, for the Northern District of California.

Now comes the defendant, Sacramento Suburban Fruit Lands Company, a corporation, by its attorneys, and respectfully shows:

That the defendant, feeling aggrieved by the verdict and judgment thereon in said cause rendered on the 18th day of October, 1928, in favor of plaintiffs and against defendant, for the sum of Two Thousand ($2,000.00) Dollars, damages, with costs amounting to Thirty-three and 10/100 ($33.10) Dollars, hereby petitions the Court for an order allowing the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and that a citation be issued as provided by law, and that a transcript of the record

upon which said judgment was based be sent to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings in this court be suspended and stayed until the determination of the appeal, and that an order be made fixing the amount of surety which said defendant shall give upon this appeal.

Dated: November 27th, 1928.

J. W. S. BUTLER,
EDWARD P. KELLY,
Attorneys for Defendant. [28]

Service hereof is hereby admitted and receipt of copy acknowledged this 27th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Pltfs.

[Endorsed]: Filed Nov. 27, 1928. [29]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the above-entitled cause and makes and files the following assignment of errors, upon which it will rely in its prosecution of the appeal from the verdict and the judgment thereon, herein made and entered on the 18th day of October, 1928, in favor of the plaintiffs, and against this defendant.

I.

The Court erred in overruling defendant's demurrer to the complaint filed in the above-entitled cause.

II.

The Court erred in overruling an objection to a question asked Herbert C. Davis, as follows:

"Q. Can you in some way give us an idea of the extent of the failure over the seven years of your operation?

A. The total loss to the corporation was about $47,000 in—

Mr. KELLY.—That is objected to as immaterial, and no foundation.

The COURT.—Overruled.

Mr. KELLY.—Exception." [30]

III.

The Court erred in overruling defendant's motion for a directed verdict, as follows:

"Mr. BUTLER.—Will you permit me to present a motion for a directed verdict?

The COURT.—Yes, but it comes a little late. The record will show the time the motion is made.

Mr. BUTLER.—Yes. I overlooked it. The defendant moves the Court to direct the jury to render a verdict for the defendant on the following grounds:

(1) That the evidence is insufficient to show that defendant deceived or defrauded plaintiffs in the making of the contract referred to

in plaintiffs' complaint for the purchase by plaintiffs from defendant of land.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land purchased by plaintiffs from defendant, or the value thereof.

(3) That the evidence is insufficient to show that the plaintiffs have been damaged by any act on the part of defendant.

(4) That the evidence shows affirmatively that plaintiffs' cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof, of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiffs' cause of action is not barred by said above quoted provisions of said Section of said Code.

(5) And also that plaintiffs have failed to prove their cause of action. [31]

The COURT.—The record will show the time at which the motion is presented. The Court merely observing that it believes that the evidence is sufficient to call for a determination by the jury, and the motion will be denied.

Mr. BUTLER.—Exception."

IV.

The Court erred in instructing the jury on the subject of the representations claimed to have been made by the defendant to plaintiffs, both as to the growing of fruit and the question of value.

V.

The Court erred in instructing the jury on the

question of the falsity of the alleged representations.

VI.

The Court erred in instructing the jury on the question of defendant's knowledge of the falsity of the alleged representations, as follows:

> "If, however, you find by the greater weight of the evidence the lands were worth less than $275 an acre in 1921, the plaintiffs' case is thus far made out, and we proceed to the next step, —and that is a rule of law, which says, that the defendant, even then, is not liable unless it knew one or the other of those representations were false, if they were both made, or should have known, was neglectful in not knowing, or made them in a positive fashion, and it will not be permitted to deny knowledge at this time.
>
> Remember, Gentlemen, that at that time the defendant had had these lands for eight, or nine, or ten years. Its [32] book says that it sold the first tract out there in 1912. It had been gathering settlers that long on these lands.
>
> It had experts in its employ. It speaks by its advertising. This book says so, Expert Horticultur*al*ist.
>
> An expert horticultur*al*ist is one who knows; and whether or not it is adapted to successful commercial orcharding. That is his business. It had other experts. If it did not know it, why didn't it know? If it was holding these lands out and taking people's money for them

on the representation that they were adapted to successful orcharding, was it not neglectful if it did not know? Furthermore, it asserts in the book—and I suppose, Gentlemen, this famous letter is still here—it says in one letter, which it makes its own, and assumes to be a letter, it is stated that it is positively proven beyond doubt the lands are well adapted to the raising of deciduous fruits commercially.

'Positively proven beyond doubt'—there is nothing stronger than that, Gentlemen of the Jury. As a matter of fact, nothing can be proven beyond doubt. But that is a very positive assertion in kind to impress, and, as counsel in his final argument for the defendant fairly admitted to you that that book was put out to impress those whom they wanted to buy the land. So when the defendant says it is positively proven, it is bound to know the condition of the land. If that representation is false, that the land was well adapted to commercial orcharding, the law imputes to them the knowledge, and they are liable accordingly."

VII.

The Court erred in instructing the jury upon the definition [33] of a "commercial orchard."

VIII.

The Court erred in instructing the jury upon the question of plaintiffs' belief in the alleged representations and their reliance thereon, as follows:

"Then there is another rule of law necessary in plaintiffs' case, and that is, that it is necessary that it appears by the greater weight of the evidence before you that plaintiffs did believe them and rely upon them, and in whole or in part were influenced and induced to buy the land because of them.

Now, again, you apply your common sense to that proposition. Why should he not believe the representation in the book, and the representation of Amblad, if Amblad made representations? The book is enough, so far as the adaptability of the land to commercial orcharding is concerned. They were down in Minnesota. They did not know anything about California, California fruit lands, or fruits, or how to raise them. He was a worker in the Ford factory. He says he believed them. That sounds reasonable and natural. The wife says she believed them, also. He says that believing it, it influenced him. He believed the representation the land was well adapted to fruit farming, commercial orcharding, and believed it was worth $275 and more an acre, and going up. The book says it is going up to $300 an acre when the orchard is in bearing. On the strength of that he says he bought it. If that appears to be reasonable, and proved to you by the greater weight of the evidence, their case is made out. The law says that on the representations made by one to induce another to buy the inference can be drawn that they

did induce him to buy, [34] that he was influenced by it. On the other hand, if you do not believe that those representations influenced the plaintiffs to buy, if you do not, by the greater weight of the evidence, find that they did influence them to buy, then, of course, the plaintiff has no case, because, no matter what false representations are made, if they do not influence them, if they are no inducement to make the bargain, they have not damaged them."

IX.

The Court erred in instructing the jury on the question of the present adaptability of the soil to the raising of fruit, as follows:

"Mr. Twining testified as an expert for the defendant. He tells you that he knows of orchards on hard-pan land generally like this, shallow soil, in Fresno, Merced, Oroville, and elsewhere, and that when the soil is prepared by blasting, that then it will be adapted to successful orcharding. He says that to blast the hard-pan opens it up and the roots can penetrate. Evidently, shallow soil is not enough for successful orcharding. Mr. Twining evidently agrees that far with Mr. Davis, because he says it must be broken up by blasting. Where you have not got five feet you proceed to make more by blasting. You will remember, Gentlemen of the Jury, that when these lands were represented to the plaintiffs as well adapted to commercial orcharding, it was rep-

resented that they were well adapted now—not that they would be made well adapted if you break up sufficient of the hard-pan by blasting. You will remember that this blasting is somewhat costly. Mr. [35] Davis says that it will cost from 60 cents to 75 cents a hole to blast, and that there are from 80 to 100 holes to the acre. That makes a pretty big item. The representation was that the land is—not that the land can be adapted by further exertions in the way of blasting."

X.

The Court erred in instructing the jury on the question of the time of the discovery of the alleged fraud with regard to the statute of limitations, as follows:

"But that is not quite all the case, Gentlemen of the Jury. It appears that the plaintiffs purchased this property away back in 1921, in November of 1921. They came out to see the place in October, 1922. The law is that one who has been defrauded into buying land, as the plaintiffs say they were, must bring their suit within three years after they discover the fact that they have been defrauded, or within three years after they discovered facts which ought, in the judgment of the jury, to have put them on notice, and which, had they pursued the inquiry with diligence, would have made them acquainted with the proof that they had been defrauded. That will be for your determination. They came on the land in 1922. The plaintiff had

found out before he came that there was hard-pan on the land. But, of course, that is not alone the defendant's contention, even to-day, the defendant insists that that hard-pan is no detriment to the land so far as fruit-growing is concerned. You can see that it is a matter not only of disputed opinion, but you must settle the disputations between experts. [36]

The plaintiff testified that he went to see Amblad about what he had heard. He did not know what hard-pan was. He had farmed to some extent, back in Wisconsin, on a general farm. So he told Mr. Amblad about it, and Mr. Amblad said to him, 'Yes, there is hard-pan there, but it is not detrimental to the raising of fruit.' He says he believed Amblad. Amblad was the same party that made the representations to him at the beginning of the bargaining, was a representative of the company, and the plaintiff was still confident that they were dealing fairly with him.

There is a presumption that all transactions are fair and regular; but that presumption, however, may be overcome by the circumstances disclosed in the evidence before you. It is also true that fraud is never presumed, but you may infer it from the evidence and the circumstances before you. He said—inferentially, at least, he had confidence in the truth of this representation.

So he came out here in October, 1922, and he did some work on the land, in the course of which he struck the hard-pan in sinking holes. Finding it

there, he then said that it was hard on the surface, and a little softer below. He developed it in his well pit, and found it eighteen feet deep. Then what did he do? He took the advice of the book. The book says, 'Consult our expert horticultur*al*ist, Mr. McNaughton.' The plaintiff says he did go to see Mr. McNaughton and asked Mr. McNaughton if that was still all right for raising fruit on that land. He says that Mr. McNaughton said, 'Yes, that is volcanic ash, it is a good thing it is there, trees need that, if you blast it the roots will penetrate, and water and air will slack that hard-pan.' [37]

Again he says he believed it. When you ask yourselves whether he did believe it, ask yourselves why he shouldn't believe it? He still had confidence in the fairness of the company. Mr. McNaughton was the company's trusted agent, to whom the settlers were entrusted to go. No one would indicate, perhaps, that that was to keep him from getting information elsewhere, but still that is a circumstance which might well appear.

So he goes to the company's expert, and the company's expert quiets his suspicions, if he had any, gives him reassurance that it was all true, that this hard-pan was valuable, and necessary to contribute to the growth and the productiveness of the trees. He says he believed it. He made no further inquiry, he says. You ask yourselves whether a person in his position ought to listen to every rumor that might pass around, if there was any. He says he heard none. He heard nothing derogatory to

the land until after the time when his suit would be in time, February, 1925. He says, though, that in 1925, having been living on the land, but always working in town, himself,—you have a right to bear that in mind, Gentlemen—he says that in 1925 he proceeded to plant trees. He planted some also in 1926—no, in 1925. The first year he says they did well. That carried him over the time, Gentlemen of the Jury, when his suit would be in time. He says two or three died the next year, several the next year, and several more the the next year, and now they don't look so good. He says that until that time he had no reason to believe the soil was too shallow, and would not grow deciduous fruit commercially. Deciduous fruits are those that lose [38] their leaves every year. He says he did not find out that these representations made to him were false until after February, 1925. His wife says the same thing. If you find by the greater weight of the evidence that that is made out, his suit is in time, and he is entitled to recover at your hands. He was only required to make inquiry when his suspicions were aroused; and if the company's representative allayed his suspicions, and there is no denial that Mr. McNaughton said that—McNaughton has not been called to deny it; so, as I say, if that was a suspicion, and if the company allayed his suspicion, that excuses him for the time being from any further diligence on his part to attempt to prove it false, unless you believe that a prudent man would not have given it any credence whatever. Remember that a person who

thus buys, where it seems to be a matter of expert knowledge, remember that the defendant is still maintaining that the land is adapted to commercial orcharding, and this expert of the defendant, also. The party buying the land does not have to go out and hire experts to see if he can prove that that which was represented to him was false, and on the strength of which he bought the land."

XI.

The Court erred in refusing to instruct the jury on the question of the statute of limitations as requested in defendant's proposed instruction No. 1, reading:

"DEFENDANT'S INSTRUCTION No. 1.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiffs must show that the fraud occurred within three years of the commencement of their action for relief, or if their [39] action was commenced more than three years after the fraud occurred, then they must show, in order to maintain their suit, that they did not discover they had been defrauded until a date within three years of the time they commenced their action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiffs will be presumed to have known whatever with reasonable diligence they might have ascertained concerning the fraud of which they complain.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiffs have proven by a preponderance of the evidence both that they did not discover the alleged fraud within the period of three years before they filed their action, and that they could not have discovered it by the exercise of reasonable diligence, three years before they commenced this suit. They were not permitted to remain inactive after the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them. They are not excused from the making of such discovery even if the plaintiffs in such action remain silent. A claim by the plaintiffs of ignorance at one time of the alleged fraud, and of knowledge at a time within three years of the commencement of their action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that [40] he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiffs contracted with defendant to buy land. Plaintiffs commenced their action on the 28th day of February, 1928; their contract with the defendant for the purchase of its land was made in November, 1921. If you

believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiffs in the making of this contract, then before you can find a verdict in their favor, you must also believe from a preponderance of the evidence that they neither knew of the fraud, nor could, with reasonable diligence, have discovered the fraud before a date three years prior to the commencement of their action, that is, before the 28th day of February, 1925. If you believe from a preponderance of the evidence that plaintiffs either knew of the facts constituting the alleged fraud before February 28th, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant."

XII.

The Court erred in refusing to instruct the jury concerning the effect of the discovery by plaintiffs of the falsity of material representations, as requested in defendant's proposed instruction No. 2, reading as follows:

"DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiffs' discovery of the alleged fraud that if plaintiffs discovered [41] that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the

falsity of any material representation concerning the land."

XIII.

The Court erred in refusing to instruct the jury concerning distinctions between representations of fact and of opinion, as requested in defendant's proposed instruction No. 4, reading:

"DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation."

XIV.

The Court erred in refusing to instruct the jury concerning the effect of plaintiffs having been able by reasonable diligence to discover the falsity of the alleged representations as requested in defendant's proposed instruction No. 5, reading:

"DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered, the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant." [42]

XV.

The Court erred in instructing the jury that defendant by its booklet represented the land sold to plaintiffs to be well adapted to the growing of deciduous fruits commercially.

XVI.

The Court erred in instructing the jury that the statements in defendant's literature applied to the lands purchased by the plaintiffs.

XVII.

The Court erred in holding that plaintiffs had presented evidence sufficient to sustain their cause of action.

XVIII.

The Court erred in not holding that plaintiffs' cause of action was barred by the statute of limitations.

To all of which rulings by the Court, defendant then and there duly and regularly excepted.

WHEREFORE, defendant prays that said judgment be reversed, and held for naught, and that defendant be restored to all which it has lost by reason of said verdict and judgment.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 27th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Pltf.

[Endorsed]: Filed Nov. 27, 1928. [43]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 17th day of October, 1928, the above-entitled cause came regularly on for trial before Hon. George M. Bourquin, Judge of said District Court, and a jury impaneled and sworn to try said cause, and the issues presented by the complaint of the plaintiffs and the answer of defendant, plaintiffs appearing by their attorneys, George E. McCutchen and Ralph H. Lewis, and the defendant, by its attorneys, J. W. S. Butler and Edward P. Kelly, and thereupon the proceedings taken, the evidence given, the objections made, the rulings thereon and the exceptions thereto, were as follows:

TESTIMONY OF J. H. HANSON, IN HIS OWN BEHALF.

J. H. HANSON, one of the plaintiffs, testified in his own behalf as follows:

In 1921 I was living in Minneapolis, Minnesota.

(Testimony of J. H. Hanson.)

I was working for the Ford Motor Company. I was classed as a tire setter. I had never been to California, knew nothing about fruit raising, nor about California lands, or California fruit lands. [44]

At that time I had some dealings with the Sacramento Suburban Fruit Lands Company, through its agent, Mr. Amblad. I had a number of conversations with Mr. Amblad, then in the course of the negotiations, I received a book.

(Witness is shown the booklet entitled, "Poultry Farms and Orchard Homes.")

That is the book I received. I read it through.

Mr. McCUTCHEN.—We offer the book in evidence, limiting our offer for the purpose of showing the representations made. We offer the whole book, however.

(Whereupon the said book was received and marked Plaintiffs' Exhibit 1.)

WITNESS.—Mr. Amblad told me that the land was adapted to all kinds of fruit, and that the literature showed it. He said they were selling at $275 an acre at that time, but it was going to go up in the near future; that the land was really worth more than they were asking. He said that most people started with poultry, especially if they did not have means enough to plant an orchard; that they started in with poultry as an immediate income, and they planted the orchards when they could afford to. He said you could have a commercial orchard; they usually used seven or eight acres for orchard, and

(Testimony of J. H. Hanson.)

the balance was used for poultry. I believed the things that he told me. I did not talk to any other agent of the company.

I signed up a contract. In signing the contract, I was influenced by the things that I had read in the book, and by what had been told me. I believed everything they told me and what I read in the book, as the truth. [45]

(Witness here identified contract, dated September 1, 1921, for lot 22 of the Rio Linda Subdivision No. 5. Whereupon the said contract was received in evidence and marked Plaintiffs' Exhibit 2.)

WITNESS.—I came to California about a year after I bought the land. In the negotiations previous to purchasing I had not discussed the hard-pan conditions out there with Mr. Amblad. After I had signed the contract, and before coming to California, I had a conversation with him about it. About six months after I had signed the contract I met a man who said he came from California. We talked about the Rio Linda district. I asked him if he knew anything about it, and he said that he knew that there was hard-pan there. I went up to the office and saw Mr. Amblad about it, and asked him if it was true they had hard-pan. I did not know just what hard-pan meant. I asked him for information regarding it, and he told me there was hard-pan there; he said it varied in depth from three to six feet from the surface, but that it was not detrimental to the raising of fruit

(Testimony of J. H. Hanson.)

trees. I believed what he told me, and made no further investigation at that time.

About six months after that I came to California. I moved on the land the first part of November, 1922. I started building a poultry-house, and when I put down the posts for the foundation, I encountered hard-pan. The soil varied; in some places it was sixteen inches, and other places it was twenty-two inches. Two feet was about the deepest I found it there.

I put in a well pit about three months after we established residence there. The surface soil when I dug the pit was about fourteen inches, then we struck the hard-pan, which was about eighteen [46] feet thick. The pit was twenty-two feet deep. Under the eighteen feet of hard-pan we ran into sand. There did not seem to be very much difference in the texture of that eighteen feet of hard-pan. It was a little harder right on the surface than it was when we got down about six inches.

At or about that time, I spoke to their horticulturist, Mr. McNaughton, about the effect of that hard-pan on fruit raising, and he said it was not hard-pan, that it was volcanic ash, that it was a good thing that it was there; that the trees needed it, and that by blasting and planting the trees in that, the roots would penetrate, and also when the air and water got down there that would air-slack. I believed what he told me.

I didn't plant any trees until the spring of 1925, at which time I planted about thirty trees. I

(Testimony of J. H. Hanson.)

cared for those trees, cultivated, irrigated and pruned them.

The first year they did fairly well, a couple of them died. The next year three or four died. The third year there were several of them died, most of them. They don't look very good now. I don't know why they don't look good, unless it is that the soil is too shallow. That is the only reason I can account for it.

I got a deed to this place instead of the contract. I executed several deeds of trust; one of them was to the F. A. Beau Foundation. All the money on that deed of trust was paid to the Sacramento Suburban Fruit Lands Company.

Prior to March, 1925, I did not find that the land was not adapted to raising fruit-trees. Nobody in the neighborhood ever told me anything about it. Prior to that time I did not learn that the land was not worth $275 an acre. Up to that time I had not borrowed any money on my land. I had not had any dealings with any real estate agents or with anyone about it. [47]

The cost of the trees and the planting of them cost me about forty-five dollars. That is the money that I actually paid out. I hired the later cultivation done, and that cost me about forty dollars. I used a windmill for power to irrigate part of the time; after I put in my electric pump, I used it for other things. The cost of irrigating is all mixed up with the other items.

(Testimony of J. H. Hanson.)

Cross-examination.

I will be forty-two years old on the 12th of November. I moved to Minneapolis in the spring of 1919, from Chetak, Baronet County, Wisconsin. Prior to coming to Minneapolis, I was engaged in diversified farming for a year and a half in Wisconsin. I got married in 1921.

I cannot recall the name of the man who came back from California and told me about hard-pan. I cannot say that I knew him personally, other than that he worked right near me for the Ford Motor Company. I had not heard of hard-pan up until that time. He heard a friend of mine and myself discussing Rio Linda. We were interested in the literature we received from the Sacramento Suburban Fruit Lands Company, and we were discussing it during the lunch hour one day, and this man said that he hoped we were not buying Rio Linda land. I asked him why and he said that it was all hard-pan. I asked him what he knew about the land and if he had ever been on it and he said that he had not been on it but his father worked for the Sacramento Suburban Fruit Lands Company when the land was laid out and had told him that it was all hard-pan. He did not tell me what hard-pan was.

We arrived at Sacramento on the 25th of October, 1922, and moved on to our land on the 11th of November, the same year. There were quite a few settlers not so very far away from our lot. [48]

(Testimony of J. H. Hanson.)

The first day we were out there, we drove around over the district. Most of the people seemed to be in the poultry business. We did not see any fruit orchards right near where my land is located. The only orchards I saw were around Rio Linda, right near the town site, and along the highway. There were a few fairly large orchards along the creek, there, right near the Rio Linda town site.

I did not talk with any of my neighbors about the soil, nor did I talk with anybody around Sacramento about raising fruit on the land that I had bought.

I dug my well immediately after establishing residence. The well pit was twenty-two feet deep. At that time I understood there was hard-pan there. I did not inquire of anybody other than Mr. McNaughton, the horticultural adviser, as to what hard-pan was.

I moved on to the land on the 11th day of November, 1922. I went to work for the S. P. Company, in the shops, the following spring, and I worked there for about six weeks; then I was employed by the American Railway Express Company, where I have been working since. I have worked downtown practically all the time since I moved there.

I planted thirty fruit-trees. I blasted for the trees; that is, I had the blasting done. I saw the soil where the blasting was done and knew it was hard-pan. I did not make any inquiry about hard-pan then, other than from Mr. McNaughton. Mr.

(Testimony of J. H. Hanson.)

Henry Jensen, a neighbor of mine, blasted the trees for me. I went into the poultry business after I came here. I brooded some chicks the first spring, 1,200. Mr. Amblad had talked with me about the poultry business before I came here.

TESTIMONY OF JENNIE B. HANSON, IN HER OWN BEHALF.

JENNIE B. HANSON, one of the plaintiffs, testified in her own behalf as follows: [49]

I am the wife of Mr. J. H. Hanson. I was living back in Minneapolis in 1921. I had never been to California and knew nothing about California lands, or values, or about fruit raising.

I did not talk to Mr. Amblad. We got the literature, Plaintiffs' Exhibit 1, and I read it through and believed it. I did not sign the contract.

After we came to California, I never heard from anyone, before March, 1925, that this land was not good fruit land, or that it was not worth $275 an acre. I never found out anything along those lines prior to March, 1925.

I did not know enough about hard-pan for it to make me think the land was not fruit land.

Cross-examination.

We are still living on our place.

(Witness is shown photograph of her property and affirms same as being a fair picture of said

(Testimony of Adolph Stern.)

property for the present year. Whereupon, the said picture is received and marked Defendant's Exhibit 3.)

TESTIMONY OF ADOLPH STERN, FOR PLAINTIFFS.

ADOLPH STERN, a witness for plaintiffs, testified:

I live out in the Rio Linda section and have had experience out there trying to grow trees on those shallow lands. The depth of my land runs from six inches to three and a half or four feet on one small place.

I planted five acres in Kadota figs, 530 trees, and also a family orchard of 27 trees. I planted my commercial orchard in 1923, and the family orchard in the spring of 1924. [50]

I plowed in the spring and plowed in the fall, and had discing done, and I cultivated the trees during the summer, and irrigated them, and pruned them. They did fairly well the first couple of years, and after that they started to grow more uneven every year. I replanted ninety-four trees in the figs, and there are about one hundred dead now. The trees that were in shallow soil grew in all these years about a foot and a half or two feet; on that small place where there was three and a half or four feet of soil, I have eight or ten trees that are eight to twelve feet tall. I do not give the trees on the deep soil more attention than I

(Testimony of Adolph Stern.)

give the others. The trees in general are not thriving, and they are not productive. Their general condition is poor and they are stunted.

I have looked around the district and seen what other efforts at fruit raising have done, ever since I planted mine, because other people planted fig trees out there, and we were trying to see who could grow the best trees, a kind of a rivalry; so I observed the care and attention other trees got. The depth of soil where the trees are planted vary a few inches in all instances, but they are all on upland, the same kind of land that I have. The land out there is not adapted to the raising of fruit-trees.

Cross-examination.

I know Mr. Hanson. I came here in August and he came in October. His south line is my north line, making a straight line diagonally across the road; his land is the ten acres north of mine, across the road.

I planted my trees in the spring of 1923, the spring after Mr. Hanson came here. I blasted for some of them. I saw the soil and the hard-pan. I did not talk with Mr. Hanson about that.

I have been a plaintiff in a lawsuit of the same character [51] as this, pending in this court, and I am a contributor to a fund to maintain the expenses of the lawsuits, generally.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFFS.

HERBERT C. DAVIS, a witness for plaintiffs, testified:

I am an agricultural specialist with the firm of Techow & Davis, engineers and chemists. I attended the University of California for about three years, and after leaving school, I had practical experience along that line at Antelope, Sacramento County. Part of the lands that we farmed there practically adjoin subdivision 5 of Rio Linda Colony, on the northeast corner. I was on those lands, altogether, before and after school, about twelve years. I was actually on the land seven years as manager of the United Orchards Company. I lived on the land some years before that, it was my home. My mother lived there.

I had full charge of all the work for the United Orchards Company. We owned about 150 acres; we farmed a good deal more than that. We attempted to raise fruit there. The soil averaged about four feet in depth on the fruit land. We had mostly almonds, although we had a number of other varieties of fruit. That whole project was an entire failure. We could not get any production on it, at all.

Q. Can you in some way give us an idea of the extent of the failure over the seven years of your operation?

(Testimony of Herbert C. Davis.)

A. The total loss to the corporation was about $47,000 in—

Mr. KELLY.—That is objected to as immaterial, and no foundation.

The COURT.—Overruled.

Mr. KELLY.—Exception.

WITNESS.—After that I had my laboratory here in Sacramento. We have [52] a general chemical laboratory and engineering office. I specialize in agricultural work. I test soils to determine their chemical analyses and determine the plant food in them. I have a good deal of experience along that line back of me. I did some of that work while I was on the land at Antelope

I examined the lands of the plaintiffs in this case; made some borings out there and made a map showing the results of my examination. The figures on the map in parentheses indicate the depth of the soil in inches to hard-pan. That correctly shows the conditions on the tract. The dots, alone, indicate that a sounding was made with a steel rod, to determine the depth, and where the circle is around the dot it indicates that a boring was made with an auger. That part down at the bottom of the map, labeled, "Cross-section, hard-pan, clay," is a cross-section through the center line of the property east and west, showing the relation between the soil and the strata of sand and hard-pan. That correctly shows the situation at that point.

(Whereupon the map was offered and received in evidence and marked Plaintiffs' Exhibit 4.)

(Testimony of Herbert C. Davis.)

WITNESS.—I made some chemical analyses of soil. I got the samples at the points indicating that a boring was made. I think there are, altogether, three borings. I made a composite sample from the whole business; then I made a chemical test of that sample, using the strong acid soluble method. The results of the test were: Potash, .128 per cent, equivalent to 5,120 pounds per acre-foot; phosphoric acid, .037 per cent, equivalent to 1,480 pounds per acre-foot; lime, .376 per cent, equivalent to 15,050 pounds per acre-foot; nitrogen, .251 per cent, equivalent to 10,040 pounds [53] per acre-foot; humus, .34 per cent, equivalent to 13,600 pounds per acre-foot.

In that particular tract there are two general types of soil; about on the north half of the tract is a grey adobe soil, and the south half is the characteristic red San Joaquin sandy loam. We attempted to get a sample that would fairly represent the average condition over the tract, avoiding those places that obviously had been fertilized, so as to get the condition of the raw land.

The content of potash and phosphoric acid that we found is about one-half of what we would expect to find in a medium or even very poor soil.

The clay shown on the map is included in the depth to hard-pan, a strata averaging about five or six inches. It runs uniformly over the land on the north half, where the soil is the adobe type. The clay is a grey clay. On the south half it is a red clay, the same as the upper soil. That clay does

(Testimony of Herbert C. Davis.)

more harm than good where it is underlaid with hard-pan that way. The clay sucks up a lot of water in the winter-time, and holds it over a long period of time, keeping the soil cold, and it has a tendency to drown out the roots of the plants that penetrate into it. The soil depth on that land averages nineteen inches. The thickness of the clay runs at an average of five inches and that is included in the nineteen-inch average. I made an examination of the hard-pan on the surface there, and I obtained these samples that you have here off the Hanson place. I think I got them on the 6th of October, the date of my examination is on the map. I got them near the west border of the property where the hard-pan came quite close to the surface; they struck it in plowing. The plow furrows were opened and we were able to pry that hard-pan loose. There are two types of hard-pan there; the sample that is greyer on top and lighter underneath is the surface crust of [54] the hard-pan. I should say it was three or four inches in thickness. Underneath it is this second sample, somewhat softer, finer-grained material; it is not quite so heavy. For agricultural purposes you call it all the same thing. I did not find out the depth of the hard-pan on that particular tract. The well pit was cemented up. I examined some of the pits on the surrounding tracts, though.

(The hard-pan samples were here received in evidence and marked Plaintiffs' Exhibit 5.)

(Testimony of Herbert C. Davis.)

WITNESS. — The lower layer of hard-pan is fairly uniform throughout the whole tract out there. The second sample, of that lighter stuff, represents the bulk of the hard-pan that I found in the examination of the pit. In the Stern property, which is across the road from the Hanson property, there is twenty-one feet of hard-pan exposed; it is fairly uniform, and is of that grey material. The Schreindl pit, a little bit further down the road, has thirteen feet. Over to the south, on the Johnson property, there is thirteen feet. On the Soderman property, there are ten and a half feet exposed. Most of those pits have hard-pan still in the bottom. There is just that much of it exposed.

The Hanson property is not at all adapted to fruit raising. The very first requirement for commercial production of fruit is depth of soil, a minimum of about five feet being considered necessary. The upper three feet of soil provide space for the growing of the feeder roots on the tree, and provide the storage for the plant food, the area for the roots; the lower strata of soil permits the penetration of the roots, and form an anchorage, and to absorb moisture, and the whole area of the five feet or more acts as a reservoir for the storage of moisture, and to provide drainage, which is a very important feature, so that the water, applied either by irrigation or [55] through the winter rains, will not stand around the roots of the tree, particularly the feeder roots.

It would not be possible to blast the soil and pro-

(Testimony of Herbert C. Davis.)

vide sufficient depth in that way in this particular type, the hard-pan is too thick. Where the hard-pan is underlaid by sand or soil at a reasonable depth, say if the hard-pan would not exceed two feet or two and a half feet in thickness, you could blast through it and form a contact all the way down, and it would be just the same as a deep soil. Where the hard-pan is as thick as this, you would blow out a pothole, and it would eventually fill up with water, and the tree roots would penetrate into it, and you would have sour sap and difficulty with the trees. The lower layer would not dissolve in water if the top layer were shattered as long as it was in place in the ground, because there are some places where there is no top layer, at all, and that material is exposed. The pressure of the surrounding country holds that in place. It does not soften up or absorb moisture to amount to anything. Some of that grey hard-pan, if thrown out on the surface, might crumble away in time. I have seen a great deal of it lying out two, or three and four years, right on my own property, identically the same stuff, and it did not disintegrate at all, unless it was ground up. The disintegration which occurs on the surface would not occur if it were in place in the ground; otherwise, there would be no hard-pan there, because there are plenty of places where the surface has been broken by nature, and water would have penetrated it. You find ditches, and cuts and cracks in the land out there and this hard-

(Testimony of Herbert C. Davis.)

pan exposed and in those places it does not show any signs of disintegration.

Cross-examination.

I am very nearly thirty years of age. I am not a graduate [56] of the University of California. I have had practical experience on a fruit land ranch. I lived out there before I went to school. That was my home, and I worked on the ranch that my mother owned there during vacations. My personal experience so far as being personally responsible for the work of the ranch started in 1919.

Q. And that was after you had finished your work in school?

A. Yes—not after I had finished all of it.

I knew at that time that it required a minimum of five feet of soil to raise fruit successfully. I had learned that in school. I had that knowledge when I made the purchase, and invested my money and commenced the operation of this ranch at Antelope.

I completed the analysis which I have given in the last two or three days. I have made analyses of samples of the soil, generally, over the entire Rio Linda district. There is a good deal of uniformity. Of course, in spots we find some differences in the analyses. That is to be expected. Generally, it runs fairly uniform. This particular analysis, I think, is just a trifle higher in results than the average that we have been finding, but it is triflingly different. It does not amount to anything. I made the analysis of the sample in question by the

(Testimony of Herbert C. Davis.)

so-called strong acid soluble method. That is a standard test, recognized by chemists generally for a particular purpose. There are, altogether, four different methods used in analyzing soils. I would not say that one was more modern than the other.

I am not a member of the Association of Official Chemists; that membership is limited to chemists in the employ of the State or of the Government, who are enforcing law. I am a member of the American Chemical Society, however. I am president of the chapter here. As a tentative method, the association of official chemists have published the so-called fusion method. That determines the [57] total quantity of anything that you want to know about the soil, irrespective of whether it is available to the plants, or usable in agricultural land. It is simply the total quantity, the same as you would analyze a rock, or a piece of granite. The acid soluble test does not give the total content of the soil. The fusion test gives the total content of the soil. Chemists, following that same test, on the same sample should, on either test, get the same result of soil content.

Redirect Examination.

That is true of either test. I selected the acid soluble test to determine the quantity of the material in the soil that would reasonably be expected ever to be available during the life of the orchard as plant food. Also, practically all of the text-books and authorities, to which we would refer to

(Testimony of Herbert C. Davis.)

for their analysis in order to make a comparison as to whether or not it was sufficient, were based on the acid soluble test. All of Hilgard's work was based on that, and he so specifies. The fusion method produces soil constituents which are not available for plant food, it takes everything that is there, whether it is available for plant food or not. There may be some of those elements in the soil that are not available to the plant; if they were incorporated in a coarse grain of sand or other material inside they would not be available to the plant at all. They would have to be fairly soluble in acid or water to be used by the plant, and sucked up by the roots. In other words, they must be soluble before the plant can make use of them. With the strong acid of the acid soluble test, you would take out everything that reasonably could be expected ever to be utilized by the plant. I think it is highly improbable that the content of the soil available for plant growth will not be gotten out, or shown, by the acid soluble test. [58]

Mr. KELLY.—Q. Then it does depend on the strength of the acid used in that analysis, does it not?

A. It does, and that acid strength is specified very clearly.

The COURT.—Q. What association did you say you belong to?

A. The American Chemical Society.

Q. Is that composed, generally, of chemists from all over the country?

(Testimony of Herbert C. Davis.)

A. Yes, it is a national organization.

Q. Do they recognize this test?

A. They do not recognize or publish anything.

Mr. KELLY.—Q. This test has not been used for years, has it, generally, by chemists?

A. Oh, yes.

TESTIMONY OF HOWARD D. KERR, FOR PLAINTIFFS.

HOWARD D. KERR, a witness for plaintiffs, testified:

I am a real estate broker and have been for nine years. I specialize in country property, and am familiar with the lands out in Rio Linda now occupied by the plaintiffs in this case. I was familiar with the general country out there in 1921.

Q. Taking you back to the month of September, 1921, what, in your opinion, was the value of the Hanson place, or the place designated as Lot No. 22, of Rio Linda subdivision No. 5?

A. May I check that just a moment, please?

Q. Yes. I am speaking of the place now occupied by the Hansons.

A. $50 an acre for the west half, and $75 an acre for the east half.

Q. That was the 1st day of November, 1921; were values any different as between September and November of that year? A. No. [59]

Cross-examination.

Mr. KELLY.—Q. What were those figures, Mr. Kerr?

(Testimony of Howard D. Kerr.)

A. The east half $75, and the west half $50.

Q. You made an examination of the Lindquist property, which you testified about on yesterday?

A. Yes.

Q. What is the difference in the lands of Mr Hanson and those of Mr. Lindquist?

A. There are two Lindquists, I have forgotten which one was involved in the case that was tried yesterday.

Q. I think it was A. J. (H. A.) Lindquist. We were talking about it yesterday.

A. What was the number of yesterday's case?

The COURT.—Well, if you don't remember say so, and we will pass on.

A. I can tell in just a moment, your Honor. The Lindquist is practically all high ground, with the exception of about three acres of low land, which gives it the proper drainage it should have for the raising of chickens, and anything else up there that the soil will produce. In this particular case we have practically the west five acres would be no use for anything unless it was hooked on to the other piece, just as it is now.

Q. How far is the Hanson property from the Lindquist property?

A. It is probably a mile and a half. I am just guessing at that.

Q. When did you make an examination of the Hanson property? A. Yesterday afternoon.

Q. That was the first time you saw it?

A. Yes, sir.

(Testimony of Howard D. Kerr.)

Q. How long were you there?

A. About twenty minutes. [60]

Q. Did you make any borings? A. No, sir.

Q. Did you examine the drainage other than as your eye could catch the contour of the land?

A. Just with my eye.

Q. And from that examination of yesterday, you fixed the value of $50 and $75 as you have stated, in 1921? A. Yes, sir.

Q. Did you take into consideration the adaptability of that land for fruit raising?

A. I did, yes.

Q. Do you or do you not?

A. I do, but I don't think it is fruit land.

Q. In fixing a value, you do not think that, do you? A. No, sir, I do not.

Q. Do you take into consideration the reputation in the community that the land has for the raising of fruit, in fixing the value?

A. I take that into consideration, yes.

Q. What is that reputation?

A. I don't think it is a fruit section.

The COURT.—No, no. You are asked what the reputation is, if you know it. Reputation is what people say about a thing.

A. It is practically the same as this piece of land. It is just a question of the typography of the land.

Q. Do you know what reputation is?

A. One after the other.

Q. Reputation.

(Testimony of Howard D. Kerr.)

A. Oh, I thought he said repetition.

Q. No, reputation. Have you talked with anybody out there about it, or have you heard others talk about it? [61]

A. I have not talked with anybody out there.

Mr. KELLY.—Q. Then you don't know what the reputation of it was in 1921?

A. Not among the people out there, no.

Q. So you could not take that into consideration, could you?

A. No. It is just my general knowledge gained in the real estate business.

Q. Assuming that that land were adapted to the successful raising of deciduous fruit, what would you say that the value of it would be, say, in 1921?

A. Around $125 or $150 an acre.

Q. That would make some difference, then, in the value, would it? A. Oh, yes.

Q. And that is true with that land in that community, generally, including the Lindquist land which you examined just the other day?

A. If it was better land than fruit land, yes.

Q. If it were adapted to fruit land, it would have a greater value? A. Yes.

Q. Yesterday morning, in the trial of the case of H. A. Lindquist against this company, were you not asked this question: "Assuming, Mr. Kerr, that this land was adapted to the successful raising of deciduous fruit, what would be its value?" or substantially to that effect, to which you answered, "It

(Testimony of Howard D. Kerr.)

would be the same, $75 an acre." Was that question asked you, and did you make that answer?

A. I made that answer, yes.

Redirect Examination.

Mr. McCUTCHEN.—Q. Do you care to explain that, Mr. Kerr? [62]

A. I meant to convey that if that was the same class of land as it is it would not make any difference, but, of course, if it was better land, and adapted to fruit, etc., it would have a different value.

TESTIMONY OF EMIL JOHNSON, FOR PLAINTIFFS.

EMIL JOHNSON, a witness for plaintiffs, testified:

I bought land out in Rio Linda in 1923. I planted trees, about sixty-five, in 1924. I cared for them, cultivated, pruned and irrigated them. The soil depth where they were planted was from six inches to two and a half feet. The trees are doing poor. Seventeen are dead, and the rest are in poor condition. A few peach trees bore a little fruit, but nothing to talk about. The trees grew probably five feet high, and like that. Some spread out and had lots of leaves on them, and some did not.

I have seen other people trying to plant trees. The land is absolutely not adapted to fruit raising.

Cross-examination.

I went on my place shortly after I arrived here

(Testimony of Emil Johnson.)

in 1923. I should say I am not quite a quarter of a mile from Mr. Hanson's place. I did not know Mr. Hanson when he first came to the district; I was not there. I did not later come to know Mr. Hanson, and have not talked with him about the country, the soil either, since 1923. I have talked with him. I have not neighbored with him.

I have been a plaintiff in a lawsuit of similar character to the one being tried, pending in this court, and am contributing for the maintenance of these actions, generally.

Redirect Examination.

My suit has been tried and I got my judgment. [63]

TESTIMONY OF JOHN POSEHN, FOR DEFENDANT.

JOHN POSEHN, a witness called for defendant, testified:

I live in the Rio Linda district. I have ten acres. I bought my land in 1923, unimproved. When I moved on the land I planted a portion of it to fruit-trees. I planted about forty trees, a family orchard. I have plums, peaches, figs, nectarines, cherries, apricots, pears. The soil depth on my place where I planted the orchard is a half a foot, a foot and two feet. There was hard-pan under the ground where I planted, and I blasted for all of the trees. After I blasted the ground, it let the

(Testimony of John Posehn.)

water through, and there was good drainage there in the holes. The growth of the trees has been very good. I measured some twelve feet high, sixteen feet wide, and about sixteen inches round over the ground. The trees have plenty of leaves on them, and look nice. All of the trees look good. I lost two trees in the winter of 1926–27. There was so much water there, and I should have drained it off. That was the reason I lost the trees, it was my fault. There was lots of rain that winter and the water stood on top of the ground. When the two trees died I took them out and replanted and have had no trouble with the trees that I replanted. They have grown well. I have all the fruit I need, and there is some on the ground. All my trees are young; they have not come into full bearing. I have plenty of fruit for my family use and more left on the ground. I think that land out there is good land for fruit-trees.

I have some grape-vines. I am in the poultry business; have fifteen hundred chickens. The depth of the soil where my grape-vines are is just about the same as the depth of soil in the orchard. I did not blast for the grape-vines. They grow very good. I planted them in 1925, and I had a good crop last year. The vines are good and strong, have lots of leaves on them and lots of stems. I cut [64] some Thompson Seedless, and there was sixty pounds on one vine, and next to that was forty-five pounds; and I cut some Malagas that had forty-one pounds. I have my own sugar scale, and I have

(Testimony of John Posehn.)

twenty-two per cent sugar. The grapes are very sweet. Some of them I irrigate, and some I do not, and the ones that I do not irrigate are the sweetest.

I raise greens for my chickens. I have alfalfa, Soudan grass, China cabbage and barley. They all grow very well. I use fertilizer on the soil for the greens, and I irrigate them. We have an overhead irrigation which is very handy. Where irrigated, the greens grow well.

My son, Robert, has a place right next to mine. He has five acres, and he has about fourteen hundred chickens. He has a family orchard of about forty trees. I planted his trees, and they have grown well. He has some fig trees which I measured the other day and found them to be twelve feet high, twenty inches round above the ground, and loaded with figs. All of his trees bear well. He also has some ornamental trees and shrubs around his place. They all grow well; I planted some ornamental trees, just like around this building. They are some thirty feet high and thirty inches round over the ground. I planted them in 1924. We dug a well pit on Robert's place. There is hard-pan about an inch or two inches in the pit and under that some more hard stuff, but you can pick it with a pick. When we took the material out of the well pit, Robert spread it out on his ground. It just goes like chalk. The pieces that are about two inches, stay hard, but not the rest. He has all the vegetables he wants on that land.

(Testimony of John Posehn.)

(At this point pictures of both the witness' property and that of his son, Robert, were received and marked Defendant's Exhibit 6.) [65]

Cross-examination.

Two peach trees died on my place in the winter of 1926–27. It was my fault that they died, I should have drained the rain water off.

The well pit that I dug was thirty-two feet deep; the hard-pan was two inches thick. I would not call the material found below that two inches, hard-pan.

Q. Below that was a substance very similar to this, showing you Plaintiffs' Exhibit 5?

A. No, that is different stuff, that is too hard.

I could pick that material below the two inches of hard-pan, but I blasted all the way to make headway. I could pick it, but it would take a long time.

I sold 1,072 pounds of grapes this fall, 1928. That is all the fruit I ever sold from my place. I bought some fruit last year, and some this year. I do not patronize the vegetable man out there. He does a fruit business, but not on my place.

Redirect Examination.

Last year I bought one pail of plums; I had my own, but a poor man came around and I thought I would buy a pail from him. He had a different kind of plums than mine. I bought one lug box of peaches from Mrs. Fred Reames, freestone peaches.

(Testimony of John Posehn.)

I have not got them on my place, and I bought one box. The kind of fruit I bought was the kind of fruit that I do not have on my place.

Mr. LEWIS.—Q. You bought some grapes from Archie Phelps, didn't you?

A. No, I have grapes to sell.

TESTIMONY OF LAMBERT HAGEL, FOR DEFENDANT.

LAMBERT HAGEL, a witness for the defendant, testified:

I own forty acres out in Rio Linda. I have owned it a little [66] over five years. My land was unimproved, at the time I purchased it. I planted fifty-eight fruit-trees for family orchard. I do not raise fruit commercially. Besides my grapes, I am in the poultry business, having fourteen hundred chickens. I have only been in the poultry business the last three years.

I know the general district throughout Rio Linda; the principal industry out there is poultry.

The depth of the soil where I planted my fruit-trees runs all the way from seven inches to twenty-four inches. I blasted for the trees. There is hard-pan for about an inch and a half and then underneath that is a hard substance that goes on down when it is dry. The soil underneath the hard-pan is a little harder than the top soil, but it is good soil.

I blasted my holes for the trees in the fall, and I

(Testimony of Lambert Hagel.)

left them standing open over the winter, and in the spring I found one that did not have any drainage, and I blasted that one again, and I planted all my trees, and they have done well ever since. After I blasted that one hole the second time, there was plenty of drainage in that. The trees have made a wonderful growth. I have two nectarine trees planted on twelve inches of soil. The trunk on those is six inches in diameter; they are about fifteen feet high, good and wide. I got about three lug boxes full of nectarines to the tree, very big in size and good in flavor. My cherry trees run all the way from two and a half to three and a half inches round the trunk, and all the way from twelve to fifteen feet high, except one that is a little weaker than the rest. All the rest of my trees are about the same size.

The material taken from the holes when blasting is done becomes just like ordinary soil on top. I have a wonderful lawn from [67] that stuff.

For three different seasons I have worked in fruit for experience in the foothills, in Auburn, Newcastle and Penryn. That is shallow soil up there, and they have hard-pan, too, and there is nothing but fruit up in that country.

I know Mr. Stern's orchard; I pass by there practically every week. I have seen it grow and know its condition. The Stern orchard was good the first two years after he had it planted, but since this sour sap went through the country, when nearly everybody lost some trees from sour sap,

(Testimony of Lambert Hagel.)

and, of course, since these trials have started, they kind of neglected their place and have not looked after it. They plow and disc it once in the spring, but they do it after the moisture is gone out of the ground. That is the way they have worked it. It doesn't do any good to plow, disc and harrow if you don't come in time and do it. I would say that his orchard is in poor condition on account of neglect.

I have twenty-eight acres of vines planted. The oldest are about three and one-half years old. I planted from cuttings, and did not blast. The soil depth in the vineyard varies all the way from six inches up to thirty-two inches. The vines have made a wonderful growth. None of them died. I never put a drop of water on them since they were planted. I cultivate as often as is necessary, and I subsoil my land. I have been cultivating my land eight times last summer, in order to keep the wind out of it. Every time it cracks a little you put a little soil over it. You have to keep it air-tight. I find that I keep enough moisture in the soil to feed the vines without irrigation. I have about four acres of grapes hanging on the vines yet, and the grapes are good and the vines are good. The nine acres that I have will produce somewhere around nine tons of grapes. I am figuring on about nine tons when I have them all in, together with what I have sold [68] already. That is this year.

That would be about a ton to the acre. The vines are young and they were not pruned for a

(Testimony of Lambert Hagel.)

crop this spring. I pruned them for shape, and not for crop. It will take another year before they reach their full bearing. A ton to the acre for those vines, considering their age and their pruning is a very good production. I shipped some to the Fruit Exchange, and the Government tested them; they tested from twenty-two to twenty-four per cent sugar. They are graded as No. 1.

In my opinion the soil on my place is adapted to the raising of fruit, and I have no doubt that if a man worked the same as I do out in that district, he would get a good growth. Considering proper preparation and care, I consider the land is adapted to the raising of fruit. You have to care for your fruit anywhere, even in the Newcastle district.

(Witness is shown picture of his vineyard.)

This was taken this year, and is a picture of a vine in my vineyard. From one particular vine last year, grown on six inches of soil, I took off twenty pounds. The vine was two and a half years old at that time. I will mention this, also, that not every vine had that much, but some of the vines had as much growth as this vine and no grapes on them, and I also have some vines that had as high as forty-five pounds.

(The said picture was received in evidence and marked Defendant's Exhibit 7.)

Cross-examination.

I sold grapes from my place in 1927. I did not ask the names of the parties to whom I sold. I

(Testimony of Lambert Hagel.)

sold between four and six tons. I sold them by the lug. You call a lug box so much weight, and a man comes and wants so many lugs, and that is what we go by. In 1928, I sold about six and a half tons. My business is poultry and commercial [69] grape growing. I have bought raisin grapes, and sold them on the vine. I bought a field of grapes in 1927 and sold them to some of the neighbors. There is John Brown, and Henry Brown, and Henry Posehn, and Charley Beaver, and Charley Wilder, here in Sacramento, and several more; I didn't ask their names. Those parties are living out in the district, except one, and one moved away. The chief business out there is poultry. Whoever wants to, or has to, works for wages elsewhere, but I could not say that practically everybody has to work out in order to make a living. I started with four hundred dollars and now I have a property there that is worth about $25,000, and it is all paid for. This year I have received somewhere around two hundred and fifty dollars from fruit. I cannot expect to receive any more, because my place is not in bearing yet. Three of the members of my family are employed elsewhere. My wife works in the cannery; my boys work out for wages. I have not for the last three years. The poultry has been my chief source of income.

I had a conversation with John V. Kral at his place in December of 1927. I told him that he should plant grapes on his place, that grapes is a paying proposition. I told him the reason why not

(Testimony of Lambert Hagel.)

to plant tree fruit was because there was an overproduction of tree fruit, and there was no market for it. I did not say that tree fruit would not grow on shallow hard-pan land such as was in Rio Linda, or anything of the kind. I did not state that I had not bought from the defendant company or that all of those that had bought from it had been cheated. I said nothing of the kind.

Q. Do you recall a conversation, again, at Mr. Kral's house, in the latter part of November, 1927, Mr. and Mrs. Perra being present, Mr. and Mrs. Klein, and Mr. and Mrs. Kral, and did you not, in response to a question by Mrs. Perra, at that time, state that Rio Linda land was too shallow for tree fruit raising? [70] A. Nothing of the kind.

Q. That it was foolish to plant tree fruit there, and expect it to grow? A. Nothing of the kind.

I did not tell Mrs. Perra, at or about that time, how I disposed of my grapes in 1927. I did not tell her that I had made wine out of them, or anything of the kind.

TESTIMONY OF F. E. UNSWORTH, FOR DEFENDANT.

F. E. UNSWORTH, a witness for defendant, testified:

I live out in Rio Linda district on the highway, this side of the town site of Rio Linda. I have five acres. I bought last October. A portion of my

(Testimony of F. E. Unsworth.)

land is planted to fruit; mostly Tuscan peaches. There is land in the orchard less than five feet in depth, where the peach trees are planted, and as shallow as thirty inches. I understand the trees are about eight years old. They are still alive and growing. They have made a very good growth. I had a good crop off them this year. There was no market for it. There were great big peaches, very good quality and good flavor. I sold them to anyone I could locally. I sold about a ton to one party that came in there. I understood he was going up north with them. There was a great deal left on the trees and on the ground. Off of one particular tree I got about five lug boxes. There are forty to forty-five pounds to a lug box. That is a very good production. I lived in California at the time I bought; I have lived in Sacramento County for upwards of thirty years and am familiar with the county. I consider the land where I am located, adapted to the raising of fruit commercially. I also raise flowers and ornamental plants and vines. Everything seems to grow well.

(Picture of the witness' property was here received in evidence and marked Defendant's Exhibit 8.) [71]

Cross-examination.

I am a meat-cutter by occupation. Prior to 1927 I had had no personal experience in raising fruit, but I had seen lots of fruit. Since I have been out in Rio Linda I have sold about one hundred dol-

(Testimony of H. F. Bremer.)

lars' worth of fruit from my place. That is from three acres.

TESTIMONY OF H. F. BREMER, FOR DEFENDANT.

H. F. BREMER, a witness for defendant, testified:

I live in the Rio Linda district and am engaged in the poultry business. I first purchased a piece of property in Rio Linda in 1922. I bought eleven and a fraction acres at that time, and planted some fruit-trees. The depth of the soil where I planted was about two and a half feet. I did not blast for them right away, but after they were planted and when the weather got dry; we planted the fruit-trees in January and February, and blasted that summer right beside the trees. That provided sufficient moisture as nourishment for the trees and ample drainage to take care of the winter water. You have to irrigate in the summer. While I was there the trees made a pretty good growth. I was there about two years, then sold the place. Later on I purchased another place half a mile east from the place that I first owned. I was then engaged in the poultry business and have been since. I have 2,500, and some baby chicks; about a thousand.

I have frequently seen the place that I first owned; I pass by there going to and coming from town, and I have also visited the place. I have ob-

(Testimony of H. F. Bremer.)

served the growth of the fruit-trees there. They have made a pretty good growth. They have had fruit on them. The trees were planted in 1923, five years ago. There was a crop of fruit on those young trees this year; they produced pretty good. I sampled the quality and flavor of the fruit and found it to be good. The fruit [72] was also good in size.

Where I now live I just planted a few trees. I did not blast for them. The soil where I planted them was two and one-half feet deep. I planted them in the spring of 1926. I also planted some last spring. They are still alive and have made a pretty good growth. I consider the soil out there adapted to the raising of fruit.

Q. Here is a picture. Is that a picture of the place you formerly owned, showing fruit-trees and other ornamental trees? A. Yes.

(Whereupon said picture was received and marked Defendant's Exhibit 9.)

Cross-examination.

My experience in fruit raising consists of attending to fifty trees that I planted on the first place out there, for a period over a year, and the twelve trees that I now have, and what I have observed. I have never sold any fruit. I never saw a fruit man that comes out there to the district selling fruit. I don't know a Mr. David.

TESTIMONY OF LOUIE TURKELSON, FOR DEFENDANT.

LOUIE TURKELSON, a witness for defendant, testified:

I live in Rio Linda on the highway, this side of the town site of Rio Linda. I have forty acres. I bought fifteen years ago and have been living there ever since. Before I came to Rio Linda I was engaged in the fruit business in Southern California. I have lived in California for something around thirty-five years. I was not an eastern purchaser. A good portion of my property is planted to fruit-trees. I have a commercial orchard. I have been in the fruit business ever since I came here. I do not raise poultry. In my orchard I have about three and one-half acres of Bartlett pears. [73] Some of those trees are planted on soil that is as shallow as three and three and a half feet. The trees on that soil are about thirteen years old. They are still alive and in healthy condition. I have had good pear crops; the quality and size of the fruit is A–1; it grades up in the market good. This year it was a medium crop, on account of the weather in the blooming season, it rained, and the bees could not pollenize, and the crop was very light. I had a very heavy crop two years ago. Two years ago I sold about seven hundred boxes, and there were over three hundred boxes left on the trees, because the packing-houses closed down and we could not dispose of them. That was due to

(Testimony of Louie Turkelson.)

marketing conditions. I sold about 208 boxes this year, and about a third of them were left on the trees. That, too, was due to marketing conditions; the market was glutted.

The soil where I am located is adapted to the commercial raising of pears and other fruit. I have about twenty-five acres of almonds, and the almond trees are planted on soil as shallow as three or three and a half feet. The trees on that shallow soil are still alive. I have not had any great loss of trees planted on that shallow soil, due to the soil depth. The trees have borne real good. They are about thirteen or fourteen years old. They are good, strong trees. I could not tell just what the tonnage of the crop was from the almond trees; some years are heavier just like in anything else; in the farming proposition some years you get heavy crops, and some years light crops. It depends on the season. My crops average up in comparison with the production of almonds in other parts of the country. I consider the soil where my almond orchard is adapted to the commercial raising of fruit.

I know the Unsworth place; have seen the orchard since it was planted. That ground was blasted in the center of the tree rows. [74] There is ample drainage provided where the ground is blasted. I consider the soil where Mr. Unsworth's orchard is located on the blasted ground, adapted to the commercial raising of fruit.

(Witness is shown picture.)

(Testimony of Louie Turkelson.)

That is a picture of my almond orchard. The reason the trees have so few leaves on them is because in the fall when we harvest the almond crop we knock them down with long poles into sheets, and when we knock the almonds down the leaves come down with them.

In the proper season, the trees are in full leafage, and are good, strong-looking trees.

(Whereupon the said picture was received and marked Defendant's Exhibit 10.)

Cross-examination.

I think the depth of the soil on the Unsworth place is about the same as on mine. I think the shallowest place on the Unsworth place is not quite three feet. My best estimate of the average depth of my soil would be five feet. If you blast, and if you get the right man who is willing to work it, soil of an average depth of 19 inches over hard-pan is adaptable to the raising of deciduous fruits. You have to blow through the surface hard-pan and hard soil, it is kind of hard underneath. That generally lets the water down. I have not had any experience in blasting on my own place but I have seen it done on Mr. Unsworth's place and Mr. Fisher's place, and places around the community.

Q. Would you consider soil on an average depth of 19 inches especially adapted to the raising of deciduous fruit? I would like to have you answer that question "Yes" or "No."

A. It is pretty hard to answer it in one word. It

(Testimony of Louie Turkelson.)

depends on the man, as I said before, and if you blast. [75]

Redirect Examination.

As far as the soil, itself, is concerned, it will produce.

TESTIMONY OF JAMES GEDDES, FOR DEFENDANT.

JAMES GEDDES, a witness for defendant, tesfiled:

I have lived in Sacramento for thirty-five years. I am familiar with the farming situation around Sacramento and the suburban subdivisions, and with the land situation in general. I have bought and sold lands in Sacramento County and in the Sacramento Valley. I have also been engaged in the fruit business in Yolo County, both as a grower and as a buyer, for a great many years, for the canners. I bought fruit for the canners around in the different orchards. I have bought land in the Rio Linda Colony. I have owned land there and sold it. I know the parcel of property involved in this litigation.

I am well acquainted with the tract of land to the north of the city, known as the Haggin Grant. I knew that when it was under the control of the J. B. Haggin interests, and I have known it from the time it was sold by the Rancho Del Paso Company and subdivided and cut up. I have also known the Rio Linda subdivision from the time

(Testimony of James Geddes.)

that it was carved out from the larger tract, and I have watched the development out there. The reasonable market value of the Hanson property, as of the 1st day of September, 1921, was about $350 an acre.

I am pretty well acquainted with the soil conditions throughout the Rio Linda Colony, as well as on the Haggin Grant, generally. I know of the existence of hard-pan all through that area, and throughout Sacramento County. I have seen the fruit growing districts in Sacramento County on hard-pan lands. If the plaintiffs' land, lot 22, of Subdivision 5, were properly planted [76] and properly handled it would produce fruit. There is plenty of evidence of it all around there. It would produce fruit in commercial quantities.

Cross-examination.

It would be hard to produce fruit commercially on such a small acreage. Most of the places are five or ten acres. There are three places right in the immediate vicinity of this place, the Melin place, the Cottrell place, and the Reese place, that are about as three nice looking young places as you will see in the state, no matter where you go. Some of those trees would be anywhere from six to eight years old; some of them would be three or four years old. I am basing my idea on the vigor and the health of the trees, and their fine appearance. I do not know the production of fruit there. I have seen the fruit on the trees, which is very good.

(Testimony of James Geddes.)

I buy property a good deal for individuals and for corporations. Sometimes I buy property for myself. I have probably bought $75,000 or $100,000 of property at different times in the last eight or ten years. A great deal of that property being in Sacramento County. Some of the properties have been conveyed to me, probably half of them. I bought property from 1914 to 1925; one or two pieces were not recorded, they were held in my name in escrow. I cannot answer offhand what property was conveyed to me between the years 1914 and 1925, the conveyance of which was recorded in the County Recorder's office of this county. That is a matter of record. If it is not of record, that settles it; if it is of record it also settles it the other way.

TESTIMONY OF E. E. AMBLAD, FOR DEFENDANT.

E. E. AMBLAD, a witness for defendant, testified:

In the month of September, 1921, I was the sales manager of [77] the Sacramento Suburban Fruit Lands Company, with my office and headquarters in Minneapolis. I was the representative of the company who dealt with Mr. J. H. Hanson, in negotiating the sale of land. It would be hard to estimate the number of meetings had with Mr. Hanson prior to the time that he signed the contract. I guess he was in my office a dozen times. I never met him at his home. He intended

(Testimony of E. E. Amblad.)

going into the poultry business. We discussed poultry very completely. We had a model of a Lyding poultry-house in our office which was exhibited to Mr. Hanson and explained to him. We looked through it a number of times. It is known as the Lyding system of operating in the poultry business, as conducted here at Rio Linda. It illustrates the various appliances for labor saving, such as the feeding system, and the general plan of conducting the poultry business.

We did not maintain in our office a model of a ten-acre commercial orchard. There was no discussion regarding the commercial orchard business in Rio Linda. The only cost or discussion of an orchard was in connection with the family orchard around his house, a few trees for family use. We never went into a discussion of a family orchard, or any orchard, on the basis of commercial profit. I did not discuss with him or propose to him the putting in of poultry for an immediate income with the plant to be scrapped when the fruit orchard came into bearing. The main talk was with regard to the poultry businesss as a course of immediate income. Mr. Hanson and a number of other employees of the Ford plant, were intending to come out here together, and later on these other men came in, and between them all, they were discussing going into the poultry business in a general way. That was a conversation with the entire group.

I described the soil in a general way to Mr. Han-

(Testimony of E. E. Amblad.)

son. I told him about the hard-pan that underlies this district, in fact, I had a [78] sample of it on my desk that I showed him, similar stuff as has been exhibited here, and that it crumpled up. It was used in the office right along, to exhibit the nature of the hard-pan. I told him he would have to consult our horticultural adviser, Mr. McNaughton, and that Mr. McNaughton would explain to him what was necessary about the particular lot that he might select when he came out here, in the way of blasting, etc. That discussion was had before he signed his contract.

Cross-examination.

I am at present in the life insurance business, employed by the Mutual Life Insurance Company of New York City, in Minneapolis. I left the employ of the defendant corporation several months ago. I was never in the employ of the Rio Linda Poultry Farms, Inc., and know nothing about that concern. I have never had any dealings with it and have had nothing to do with it.

I told Mr. Hanson that the district, in general, was adapted to the growing of the various fruits, such as described in the booklet that he had. I told him that the character of the soil would vary; that one part of the district would be deeper soil, and possibly different drainage; that over an area of eight miles it varied, and that he would discover those differences when he came out to select his land. He selected a piece of land on which he made

(Testimony of E. E. Amblad.)

a payment back in Minnesota, but he had the right to exchange when he came out here. He had never seen the lot he then selected. I did not tell him that it was the choicest lot in the district. I did not say that we had a very choice lot there for his consideration, that we had picked out for him. We had several lots in the office that the horticultural adviser would recommend as good lots to sell off the map to anybody wanting to buy them. This was one of the lots. [79] I told him that it was a good average lot, such as we would recommend selling off the map. I did not tell him that the soil was nineteen inches in depth, as an average, over the lot. I did not say that this land was not especially adapted to the raising of deciduous fruits, the land that he was buying. I told him that poultry was the principal thing that all the people in the district were going into. We did not talk about orcharding commercially. Later on if he wanted to develop the balance of the tract, after the establishment of a poultry business, and put it into any kind of fruit, he might have an acre, or two or three acres, and he could do like many others were planning to do.

The number of acres of land that he would be using in connection with his poultry business would depend on how his capital would allow him to go into the business. To begin with, he was just going into the poultry business on a slight scale, and as he got his money from these other properties he would go into it on a larger scale, and he would use

(Testimony of E. E. Amblad.)

the balance of his land. He would not necessarily have to use the entire ten-acre tract for poultry. He might want to plant an acre or two in fruit. Five or ten acres would be consumed as an average in the poultry business; the plans are to cover the whole ten acres. I absolutely did not calculate on about eight acres being used in a commercial orchard business on this particular tract of land.

Redirect Examination.

I showed Mr. Hanson our price list, which as of that time, was $275. The custom of the company was, that the directors would get out a price all through the colony every so often, and the next advance was to be probably a twenty-five dollar advance. That advance was to come late in the fall, about November. The rise in price was made. I did not tell him that the land was worth more than we were [80] asking for it.

Recross-examination.

I did not tell him that it had increased in value since the price was fixed at $275. I told him our next price list was to be issued about November 1st, and the price then would be three hundred dollars an acre. The company had established price lists which we had to operate by, and we could not vary from them.

I showed Mr. Hanson the price list. That varied in different districts, some place $250, some places $275. We have various prices, according to locality. We did not discuss whether the land was worth $275.

TESTIMONY OF ARTHUR MORLEY, FOR DEFENDANT.

ARTHUR MORLEY, a witness for the defendant, testified:

I live in what is known as the Arcade district, about a mile south of the south line of Rio Linda. My place is southeast of the Sacramento City Park, the Del Paso Park; south of the Auburn Boulevard. I have lived out there about eight years. I have about seventeen acres and have owned it about eight years. It is all planted to fruit-trees. Most of it has been planted about ten years. Nearly all of it was planted when I purchased it. The general acreage depth of soil on my place is about a foot and a half to three feet. The ground was blasted where the trees were planted. Where the ground is blasted there is sufficient drainage provided for the trees. The character and quality of the hard-pan there is about the same as that in the Rio Linda district. I have seen that hard-pan and substratum underneath the hard-pan thrown out onto the ground by blasting. It disintegrates and becomes soil after being exposed to the air and the elements; it is nearly all gone within a year, except possibly the very top layer of about an inch thick; usually that takes [81] a little longer to break up. When that hard material or substratum breaks up it will grow plant life and fruit-trees. There is nothing whatever that is detrimental to the growth of fruit in it. I think it is

(Testimony of Arthur Morley.)

equally as good as the top soil. Things grow nice and get on nice in it when it is planted. My trees, in that character of soil, in blasted holes, have made a very satisfactory growth. Generally speaking, my orchard is in a good, healthy condition. I ship, usually, about one thousand crates of plums. That is off of about six acres. Then I have pears, a few apricots, and some cherries and peaches. The plums usually run about seventy or eighty crates to the ton; about twenty-five pounds to the crate. I usually ship about one thousand crates. The quality of the fruit is No. 1. It goes under the Blue Anchor Brand, of the California Fruit Exchange, which is the highest quality that they ship. I have had about seventeen or eighteen years' experience in the fruit growing business. During that time I have had experience in the growing of fruit on river bottom lands, on uplands, all over. The majority of plums, peaches, and apricots, and that variety of fruit are all grown on the uplands. That is, the shipping varieties from here, and up through Carmichael, Fair Oaks, El Dorado County, Placer County, Newcastle, Penryn, Auburn, and up through there. That land is all granite formation, and very shallow soil, lots of it. You find very few olives, almonds and apricots and those kinds of fruit on the river bottoms; they practically all grow on the uplands. The presence of hard-pan, or the shallowness of the soil above the hard-pan is not a detriment to the raising of fruit.

I have looked after the work of pruning and the

(Testimony of Arthur Morley.)

picking of crops in season on places other than my own. I find all the orchards have been blasted for. Some of those orchards include: George Filcher has twenty acres; Mr. Fletcher has twenty acres; Mr. Wanzer has [82] thirty acres; Mr. Missble has ten acres; O. G. Hopkins has probably twenty acres. Dr. June B. Harris has an orchard and Owre Brothers have quite an orchard of peaches and almonds. All of those orchards are on the uplands and on hard-pan land of shallow soil, blasted. Generally speaking where those orchards have been cared for, their growth has been very good and they have good crops every year. As to the almonds, they had half a ton to the acre on some orchards, which is a good crop. On Mr. Hopkins' place, according to my estimate, I should think the six year old prunes would go about a ton, dried, to the acre, and he has about ten or twelve acres. For that age of tree, that is very good production.

The trees in the Dr. Harris peach orchard were heavily laden; they had a good crop. They were breaking down from the load. The market for the peaches was poor but the production was good.

I have been all through the Rio Linda district. For a period of about thirty days, I was specially employed by the Sacramento Suburban Fruit Lands Company to make a general agricultural survey of that district. In doing so, I observed the soil, the depth, and the quality, and the character. It is very similar in type to the soil on my side of the ranch, and of a similar depth. Just about the

(Testimony of Arthur Morley.)

same hard-pan conditions are prevalent. I think the soil in Rio Linda is as good as ours. I think you can raise fruit there as well as you can on our land, and I know that fruit is raised successfully, commercially and profitably on our land.

I made a count of the number of trees and vines that are now growing in the Rio Linda district. The results were as follows: Almonds, 18,720; olives, 9,370; peaches, 7,060; plums, 2,950; pears, 8,875; prunes, 6,040; figs 10,230; apricots, 1,550; Walnuts, 490; cherries, 9,465; apples, 600; persimmons, 100. That is outside of the family orchards. We estimated about twenty-five trees to the family orchard, three hundred and twenty-five orchards; that would make 8,100 trees. [83] The total number of trees that I found growing in the Rio Linda Colony came to 91,750, and the total number of vines would be 100,900. The trees and vines respond to care. Those that have been taken care of were producing good crops, and the trees look very good. Others had been neglected and of course the trees were not doing so well. Pruning, irrigating, cultivating, all have to be done in the right time, and properly, and if done on that type of soil, the orchard will respond. That type of care will pay. Where given this proper care the trees will produce good crops commercially, which if the market was normal, would be profitable.

I made some investigation to determine whether or not root growth would penetrate into hard-pan where blasted alongside of one plum tree and three

(Testimony of Arthur Morley.)

olive trees. We dug down about four feet, and we found that the roots were extended through the subsoil underneath through the hard-pan. That was the case with the plum tree, as well as with the olive trees.

(Witness is shown pictures.)

Those are pictures taken of the excavation by the side of the olive tree; the roots were not especially posed for the purpose of taking the pictures, we found them just that way. The pictures represented the situation absolutely as we found it.

(Whereupon the said pictures were received in evidence and marked Defendant's Exhibit 11.)

Cross-examination.

For certain varieties of fruit I think the hard-pan uplands are as good as river bottom lands. I did not particularly have that idea in mind when I went out to Rio Linda to make the survey. I first formed that idea when I bought my place, eight years ago, but I did not have it in mind in making the examinations in Rio Linda. I was employed by the Sacramento Suburban Fruit Lands Company to go [84] out there and make a survey of the fruit-trees; that was about a month or six weeks ago. Mr. O. W. Jarvis, who was formerly farm adviser here, and is an agricultural expert, was also employed by the defendant company to accompany me on the investigating tour. I went as a practical farmer. Mr. Jarvis was with me during all of the investigating. We counted

(Testimony of Arthur Morley.)

all the trees in the district. The biggest majority of them were thriving and productive down in the creek bottoms, and where the soil was deep; some of the creek bottoms and some of the deep lands over where Mr. Unsworth and Mr. Turkelson are. On the highlands we found that some trees had been neglected and there were some very nice orchards up there. Generally speaking, you can tell whether the trees that have been neglected were doing well before the owner started to neglect them.

We have some pictures taken out there of an olive orchard. I don't know who picked out the olive orchard. Mr. Jarvis said that was where we were going and I went with him, but I don't know whether he picked it out or not. We did not choose an olive orchard because we knew that olive roots would penetrate places that other roots would not; that was not the reason. It is not true that olive roots are very fibrous and will go into crevices and cracks that other roots will not.

We did not find out what the yield of that orchard had been. I don't know whether the orchard had been paying. Olive trees live for hundreds of years, but at ten years an olive tree should be in bearing. The crop on these trees was small this year; it was all over the Sacramento district; no more in the Rio Linda district than anywhere else. I think the orchard was owned by a Mr. Smith; he was not there; the place showed lack of care. [85]

In addition to my own seventeen acres, I super-

(Testimony of Arthur Morley.)

intend the picking of the crops and the pruning of about ninety acres of other property. One of those places is the Wanzer place. I don't know the soil depth on that property. I know it was all blasted, and I know there is a lot of shallow soil there.

I have referred to the O. G. Hopkins place, and I know that Mr. Hopkins is a lawyer. I do not know that he has never made any money off his place. I know he has nice crops. I heard him testify and I heard him say that his place was profitable because of the exercise that he had gotten out of it; I also know that he has produced profitable crops there. I could not say that he has not made any money out of it; I know it is a valuable property now. I have not investigated any of these places as to whether they made money off them. We just look after the crop. I could not tell you anything about whether Mr. Holmes just broke even on his place. All I know about that is from what I heard him testify.

TESTIMONY OF F. E. TWINING, FOR DEFENDANT.

F. E. TWINING, a witness for defendant, testified:

I live in Fresno. I am an agricultural chemist and have been engaged in agricultural work for twenty-eight years. I have a laboratory for my experimental work at Fresno. In the course of the practice of my profession, during the last

(Testimony of F. E. Twining.)

twenty-eight years I have made a pretty general examination and investigation and analyses of the soils and soil conditions up and down through the San Joaquin and Sacramento valleys. I am familiar with them pretty generally throughout that entire district. There are thousands of acres in the Fresno district that are underlaid with hard-pan, and where the soil is of shallow depth. Tree fruits are being raised upon those shallow lands, with hard-pan underlaying them, in the Fresno district. [86] A great variety of fruit is being raised on that type of land; oranges, figs, olives, principally, peaches and, of course, grapes. There the lands are very shallow, within two and a half feet of the surface, they are generally blasted.

I am acquainted with the Rio Linda section and the hard-pan out there. There is considerable soil in the Fresno area that is the same type of soil. There is some in which the hard-pan is more dense than that in the Rio Linda district, where there is a harder hard-pan. Fresno is noted as a very large grape-growing district. There is an immense production of both raisin and table grapes there, thousands of acres. I have seen very good vineyards on a foot and a half and two and a half feet of soil. I have known vineyards on two and a half feet over twenty-five years of age and producing in quantities. As a general thing the ground is not blasted for the vineyards. On the heavy hard-pan lands are the best flavored and earliest maturing grapes, as a rule.

(Testimony of F. E. Twining.)

I know of no rule among horticulturists or fruit growers requiring a minimum of five feet of soil necessary to the successful growing of fruit-trees. Trees will grow on less than five feet of soil; will live, and produce commercially.

I am familiar with the fig district between Madera and Fresno, the Faulkner fig orchards. The soil throughout that orchard is all underlaid with hard-pan. The soil depth runs from the surface down to a few feet, and most of it is on shallow depth. Practically all of those fig trees are blasted for. The blasting provides ample drainage. The trees have lived, thrived, grown and produced in that shallow hard-pan soil, blasted.

I am familiar also with the Florin grape growing district. That, too, is hard-pan shallow land. The earliest maturing, the best quality and flavor grapes in the Sacramento or San Joaquin valleys [87] come from Florin. The soil is exceedingly shallow and hard-pan.

I am familiar with the fruit growing district around Oroville. There is shallow hard-pan land there. They raise fruit there. The Oroville olive and orange crops are the best in the State, and early in maturity. Those olives and oranges are grown on hard-pan lands, shallow, depth and blasted.

I know of some very fine peach orchards in Sutter County on shallow land. I am not so sure about its being blasted, but it is on hard-pan land,

(Testimony of F. E. Twining.)

and some of it must be blasted. In my opinion, considering these various districts that have been spoken of, fruit can be grown commercially and successfully on shallow hard-pan land.

I am familiar with the Rio Linda district; have made between three and four hundred borings out there, generally all over the district. I have also made some chemical tests of the soil in that district. I took some samples and made some chemical analysis of the soil of the plaintiffs in this case. My findings as to phosphoric acid and potash were: Phosphoric acid, total, .17, or 6,800 pounds per acre-foot. Potash, .75, or 30,000 pounds per acre-foot. From twenty-five to fifty pounds of phosphoric acid and from fifty to one hundred pounds of potash is used by a crop of fruit from an acre in a year's time. There is a sufficient quantity of phosphoric acid and potash in that soil to last for quite a number of years. I used in finding those results, the method determining the total amount present in the soil, known as the fusion method, the only method that is recognized. It is one of the tentative methods published in the proceedings and book of official methods of the American Association of Agricultural Chemists. Some chemists use the method of making a soil solution by acid, but it has no official standing, at all, and is not recognized by any of the recent works on [88] chemical analysis. That method was discarded by the American Association of Agricultural Chemists about twenty-five years ago. There is no stand-

(Testimony of F. E. Twining.)

ard relation between the available chemical content and the total chemical content in soils. There has been no method of determining exactly what amount of it was available, that is, of potash or phosphoric acid in a soil; therefore, we determine the entire amount. We have certain methods of determining to see the amount of water soluble for certain purposes. The most you could determine by the other method is simply to say how much is water soluble and how much is acid soluble, and the only safe method of determination is to determine the total.

I would say, in my opinion, that the Hanson property is adapted to the commercial raising of fruit. I have a sample of the hard-pan taken from this property. I find the thickness of the hard-pan structure varies. It stratifies. The thickness of the first hard-pan, that is, the red, will vary from a fraction of an inch to two or three inches. The red sample is the top layer or the hard-pan area. It will absorb water. The top is impervious and must be broken up, but the main bulk of the hard-pan will absorb water. The water will stand on top of the impervious part. Only a very small amount, a fraction of an inch, is impervious to water. Underneath that it is a lighter color, from a light red to a grey, and it is much softer. It breaks up very easily. If the top layer of the hard-pan is shattered by blasting, this sub-layer will absorb water, and will permit sufficient absorption to provide drainage for a tree or plant planted

(Testimony of F. E. Twining.)

in it. It will also retain that moisture to provide moisture back for the plant. If broken by blasting and wet it will stay broken, and not re-cement itself. If it is thrown out on the ground and exposed to the air and the elements, it will then disintegrate; most of it over one winter, after a wet season. [89] After disintegrating there is nothing in this material that is detrimental to plant life. It contains elements the same as the top soil.

Q. I want to show you these two samples that have been brought in by Mr. Davis as samples of hard-pan taken from that property. Will you examine them and tell me what you can about them in comparison with the sample that you brought?

A. This is some of the first hard-pan, the hardest.

Q. That is the top layer? A. Yes.

Q. And that streak that you see on top, there, is that the impervious portion? A. Yes.

Q. Now, examine this. Is that still a part of the top layer? A. This is probably under that.

Q. You are familiar with this material such as I have just shown you, the lighter color material?

A. Yes.

Q. Will it distintegrate? A. Yes.

Q. Will it form soil and support plant life?

A. Yes.

Mr. BUTLER.—These two samples brought in by Mr. Twining are now offered in evidence.

(Testimony of F. E. Twining.)

(Whereupon the same were received and marked Defendant's Exhibit 12.)

Cross-examination.

I was never connected with the Faulkner Orchard Company, nor [90] ever employed by it. That was a subdivision north of Fresno, and sold principally to Fresno people. I would not term it a colonization scheme.

We made an alkali survey of some of the lands of the United States Farm Lands Company. I suppose that was a colonization scheme.

The acid soluble method is not actually recognized; it is used by some chemists as a short method. All of the principal recent works on chemical analysis only give the official method.

I don't know Edwin G. Mahan; I know who he is. If I am not mistaken, he wrote a short text-book. I could not say if he is a professor of analytical chemistry at Purdue University. I do not know anyone by the name of Ralph H. Carr. Those are names of small text-book writers, probably, written for school purposes. One of the principal methods used by the principal laboratories, is Scott's methods. I would not say that it is the only one used. There are dozens of different text-books. Mahan is a good teacher.

Q. I will show you the book, Mr. Twining, entitled "Quantitative Chemical Analysis," by the two gentlemen mentioned, 1923, Copyrighted.

This is a second impression made in 1923. I

(Testimony of F. E. Twining.)

imagine they simply gave some short methods in it. It is not a book that is used generally. I would not question that it is an authorative book.

Q. This says that chemical methods for studying the soil may be considered under the following heads: (a) Complete analysis; (b) potential plant food; (c) available plant food. Those are the three heads, are they not?

A. Those are the three heads in there. We know that the potential plant food may be all that is present.

Q. You would not agree with that statement, would you? A. No, I would not. [91]

Q. You would overrule it?

A. We are talking now of phosphoric acid and potash. Of course, those two we would not call a complete soil analysis. When they speak of potential plant food they may mean only those particular elements present in the soil which are plant foods.

Q. I will ask you if this statement is correct: "This is separated by digesting the soil in hydrochloric acid at a constant boiling point, specific gravity 1.115, containing about 23 per cent of hydrochloric acid, using the ratio of one part of soil to ten of acid, thus affecting the solution or partial decomposition of soil minerals. This was formerly the official method." Is that a correct statement?

A. Formerly the official method.

(Testimony of F. E. Twining.)

Q. Answer my question: Is that a correct statement? A. That statement is correct.

Q. And that is the method of determining the potential plant food: Is that true?

A. No, sir.

Q. Is there any other method? A. Yes.

Q. What?

A. If I were to take a soil and make a test of it to ascertain the potential plant food, I would use a basic method.

Q. And that would bring out all of the plant food that was in rocks and gravel, and sand, and everything else, wouldn't it, which the plant could not reach? A. No.

Q. You are talking about some method other than the one you used, are you not—that is what you are talking about now, isn't it? [92]

A. Yes.

Q. What is that method?

A. It is a long and intricate method of taking the various combinations of elements in the soil; for instance, a particular soil like this is deficient in lime; we would make a solution containing lime, and see how much potash, phosphoric acid, or whatever it might be, would be displaced by that method; in other words, would become available to the plant.

WITNESS.—I would not say it surely was, but I don't think the method just read was included in Scott's work. I would not swear that it was not.

I cannot name other authorities on quantitative analysis that this method has been left out of in

(Testimony of F. E. Twining.)

recent years, but I can bring you at least a dozen books, all of them authorities, and the very latest publications, which do not mention the plant food potential, analysis. Very few of them will mention the potential plant food analysis. I don't think that Scott mentions it; I don't think that Griffin mentions it. I don't think you will find it mentioned in the recent works of Lunny, or Lemmerman, or any of those works.

The tests on this soil were made by me, I think, nearly a year ago. I took the samples off the land myself. I think Mr. McNaughton was with me on that trip; I would not say for sure.

I was by the Hanson property not very long ago; there is a house that I think faces east; there is quite a lawn, or an alfalfa patch, or something in front of it.

If it is blasted and properly broken up, so that drainage is provided, the land out there would be adapted to fruit raising. [93]

TESTIMONY OF IDA E. PERRA, FOR PLAINTIFFS (IN REBUTTAL).

IDA E. PERRA, called for the plaintiffs in rebuttal, testified:

I live out in Rio Linda. I know Lambert Hagel. I remember being over at the Kral house in November, 1927, when Mr. and Mrs. Kral were present, Mr. and Mrs. Klein were there, and my husband and I. I had a conversation with Lambert Hagel at that time, and he told me that the Rio

(Testimony of Ida E. Perra.)

Linda land was too shallow for tree fruit raising. He said that it was foolish to plant trees there and expect them to grow. He also told me that he used his grapes to make wine.

Cross-examination.

My husband and I were plaintiffs in a lawsuit of the same kind as is being tried to-day; our case has been tried. We are contributing to a fund maintaining these actions generally.

TESTIMONY OF JOHN V. KRAL, FOR PLAINTIFFS (IN REBUTTAL).

JOHN V. KRAL, called for plaintiffs, in rebuttal, testified:

I live out near Mr. Hagel. I remember having a conversation with him in December, 1927, about what I should plant on my land. He at that time told me that it was useless to plant fruit-trees there. He said that fruit-trees would not grow on that shallow hard-pan. He also said that he did not buy from the company, but that all those that did buy from the company had been cheated.

Cross-examination.

Mr. Hagel told me at that time that he would not advise me to plant the land to trees, but to plant grapes and they would grow. I was kicking at the price of the land, and he said, "Mr. Kral, don't kick, it's no use, we all know that the company beat us on the land, but the best way for you to do is

(Testimony of John V. Kral.)

to do the same like I did, spend [94] twenty-five or fifty dollars more and plant some ornamental trees and some shrubs and make the front of the place look nice and wait until some easterner comes and buys you out." He said, "I am figuring the same way."

I am a plaintiff in a lawsuit pending in this court of the same kind that is being tried to-day. That conversation was had a short time before I commenced my action. I am also contributing to a fund to maintain these actions generally.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFFS (RECALLED IN REBUTTAL).

HERBERT C. DAVIS, recalled for plaintiffs in rebuttal, testified:

I am familiar with the cost of blasting lands for planting trees in land similar to that in the Rio Linda section. It amounts to sixty to seventy-five cents a hole, and the variety of trees and the number of acres regulates the cost per acre. Generally of deciduous fruit there are eighty to one hundred trees to the acre.

Mr. KELLY.—Q. Did you ever blast anything on the Rio Linda Colony?

A. Not on the Rio Linda proper, just on adjacent lands.

The cause was thereupon argued to the jury. During the course of the argument counsel for the

defendant admitted that defendant by its literature had represented to plaintiffs that the piece of land which they purchased was proven beyond a doubt to be well adapted to the raising of fruit commercially and that this representation had been made for the purpose of inducing plaintiffs to buy the land.

After the argument, the following occurred:

Mr. BUTLER.—Will you permit me to present a motion for a directed verdict?

The COURT.—Yes, but it comes a little late. The record will show the time the motion is made. [95]

Mr. BUTLER.—Yes. I overlooked it. The defendant moves the Court to direct the jury to render a verdict for the defendant on the following grounds:

(1) That the evidence is insufficient to show that defendant deceived or defrauded plaintiffs in the making of the contract referred to in plaintiffs' complaint for the [96] purchase by plaintiffs from defendant of land.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land purchased by plaintiffs from defendant, or the value thereof.

(3) That the evidence is insufficient to show that the plaintiffs have been damaged by any act on the part of defendant.

(4) That the evidence shows affirmatively that plaintiffs' cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof.

of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiffs' cause of action is not barred by said above-quoted provisions of said Section of said Code.

(5) And also that plaintiffs have failed to prove their cause of action.

The COURT.—The record will show the time at which the motion is presented. The Court merely observing that it believes that the evidence is sufficient to call for a determination by the jury, and the motion will be denied.

Mr. BUTLER.—Exception. [97]

Before the Court's charge to the jury, defendant requested the following instructions:

DEFENDANT'S INSTRUCTION No. 1.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiffs must show that the fraud occurred within three years of the commencement of their action for relief, or if their action was commenced more than three years after the fraud occurred, then they must show, in order to maintain their suit, that they did not discover they had been defrauded until a date within three years of the time they commenced their action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiffs will be presumed to have known whatever with reasonable diligence they might have as-

certained concerning the fraud of which they complain.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiffs have proven by a preponderance of the evidence both that they did not discover the alleged fraud within the period of three years before they filed their action, and that they could not have discovered it by the exercise of reasonable diligence, three years before they commenced this suit. They were not permitted to remain inactive after the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them. They are not excused from the making of such discovery even if the plaintiffs in such action remain silent. A claim by the plaintiffs of ignorance at one time of the alleged fraud, and of knowledge at a time within three [98] years of the commencement of their action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiffs contracted with defendant to buy land. Plaintiffs commenced their action on the 28th day of

February, 1928; their contract with the defendant for the purchase of its land was made in November, 1921. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiffs in the making of this contract, then before you can find a verdict in their favor, you must also believe from a preponderance of the evidence that they neither knew of the fraud, nor could, with reasonable diligence, have discovered the fraud before a date three years prior to the commencement of their action, that is, before the 28th day of February, 1925. If you believe from a preponderance of the evidence that plaintiffs either knew of the facts constituting the alleged fraud before February 28th, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant.

DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiffs' discovery of the alleged fraud that if plaintiffs discovered that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the falsity of any material representation concerning the land. [99]

DEFENDANT'S INSTRUCTION No. 3.

You are instructed that plaintiffs cannot recover in this action unless they were deceived by the al-

leged representations, for if the means of knowledge are at hand, equally available to all parties, and the subject of purchase is alike open to their inspection, if the purchasers do not avail themselves of these means and opportunities, they will not be heard to say that they have been deceived, unless they were induced by trick or misrepresentation of defendant not to make such inspection.

DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment or probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation.

DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiffs discovered, or by the exercise of reasonable diligence could have discovered the falsity of the alleged representations as to value of the land they bought, more than three years before they commenced their action, then your verdict must be for the defendant. [100]

CHARGE TO THE JURY.

The COURT. (Orally.)—Gentlemen of the Jury: You have heard the evidence and the arguments, and now it is for the Court to deliver to you the

instructions. They are mainly to make you acquainted with the law which applies to this case, and in the light of which you will determine the facts. Remember, you take the law from the Court, but the facts, what witness to believe, what weight to give to the testimony, what inferences to draw from the circumstances, that is entirely your function, and when you have determined the facts by your verdict we take them from you.

This is a civil action. Plaintiff alleges certain matters for a cause of action against the defendant. The defendant denies part of them, the material and vital ones.

In a case of this sort, it is incumbent upon the plaintiff to prove substantially what he alleges, by the greater weight of the evidence, or he is not entitled to recover. I should say "they," because there are two plaintiffs, husband and wife. The defendant is not required to prove that plaintiff has no case. At most, it is privileged to offset the plaintiff's case, so far as it can, and go as far in that direction as it sees fit. If, then, when you come to consider all the evidence together, the greater weight of it is not with the plaintiff, the defendant will be entitled to your verdict. Remember, when I say that the burden is upon the plaintiff, it, after all, means simply this: You take into consideration all the evidence, that in behalf of the plaintiff, and that in behalf of the defendant, as well, and, determ*in*g where the truth is in it all, if you then cannot say that the greater weight of it is with the plaintiff, the defendant is entitled to the

verdict. If the greater weight is with the plaintiffs, they are [101] entitled to the verdict. If there is anything that makes in behalf of the plaintiffs in the defendant's case, you give the plaintiffs the benefit of it; and if there is anything in the plaintiffs' case that makes in behalf of the defendant, you give the defendant the benefit of that.

The first thing to explain to you will be what is meant by the greater weight of the evidence and how you arrive at it. You may conceive the evidence in two scales, all that makes for the benefit of the plaintiffs in one, and all that makes for the benefit of the defendant in the other, and unless the plaintiffs' is the heavier, they are not entitled to recover. If it is left, in your judgment, in equal balance, or if the defendant's is heavier, the plaintiffs would not be entitled to recover, and the defendant would be.

Now, in passing on the credibility of the witnesses who have testified before you, you, of course, see the witnesses before you; you observe their demeanor; you take note of the probable amount of knowledge which they may have in respect to what they testify, and you take note whether they are testifying freely, frankly, fairly, or whether they seem inclined to exaggerate or to avoid direct answers, or to mislead you. The office of a witness is solely to aid you to arrive at the truth; and it is for you to determine how far these various witnesses have fulfilled that office. You take note of the unreasonableness of any witness' testimony, if there is anything unreasonable in it. Reasonable-

ness is a great test of truth. Whether the witness contradicts himself, whether he is contradicted by previous statements made by him elsewhere than in court; if any such have been proven before you, whether he is contradicted by other witnesses whom you prefer to believe, or whether he is contradicted by circumstances—it is an old saying in the law that witnesses may testify falsely and circumstances [102] may point unerringly to the truth. That is undoubtedly so. You may, on occasion, prefer to believe all the circumstances that surround the case, rather than the testimony of some witness that, in your judgment, conflicts with the circumstances, and is unreasonable in light of them.

You take note of the interest of a witness in so far as any appears. Of course, it is very clear that the two plaintiffs have a large interest in this case. You ask yourselves whether other witnesses, for the plaintiffs as well as witnesses for the defendant, have been inspired at all by the manner in which they are aligned, by partisanship, to deviate from the truth in presenting the facts as they represent them to you.

There is a maxim of the law that witnesses are presumed to speak the truth; but you may see instant reason why you will not give them the benefit of such presumption. You might see it in their demeanor, in their manner of testifying, their interest, or anything else that would affect your judgment as to their credibility.

There is also another maxim of the law that if any witness has testified falsely before you in any

particular you have a right to and should distrust all the balance of the testimony of that witness, and, if your judgment approves, you may reject it all, because, if you believe any witness has testified falsely in one particular, if his oath has not held him faithful to the truth in one particular, what confidence can you have that it has in other particulars?

Another rule of law is that one witness is sufficient to prove any fact in issue in this case, provided he is worthy of credit, in your judgment, and you give him credit accordingly. You may believe one witness in preference to several on either side. The number of witnesses is not vital. That is very obvious. There [103] may be occasions when you would prefer to believe one to several. But if you believe that witnesses have equal opportunity to know what they are talking about, and equal recollection of the facts, and equal honesty and accuracy in reporting them to you, then, of course, the number of witnesses might well weigh heavier than a single witness.

You are not obliged to believe that anything is so simply because some witness swears it is so. That is obvious. My predecessor in Montana, Judge Knowles, used to illustrate that to the jury—it might not be quite as striking in the case here, but he would say this: "You are not obliged, Gentlemen of the Jury, to believe a thing is so simply because some witness swears it is so. A witness may take the stand and swear most solemnly that down the street he saw an elephant climbing a telegraph

pole; you are not obliged to believe that, even though he offers to take you down and show you the pole."

Now, of course, I don't say there is anything like that in this case, and I simply mention that to you by way of illustration. It is for you to weigh and determine what witness speaks the truth, and how far, and your determination is final. The same method by which you determine the truthfulness of men with whom you deal in daily life, just by that same method you determine the truthfulness of the witnesses here. The processes of reasoning and of judgment which animate you in your business are not changed because you are in the jury-box. Whenever you have determined where lies the greater weight of the evidence, or, rather, unless you determine that the greater weight of the evidence is with the plaintiffs, they are not entitled to a verdict, but the defendants are.

Now, as to what the plaintiffs allege. They allege, in substance, and the case has been tried on that theory, taking the [104] opening statements, and the course of the evidence, and the final arguments of counsel—the plaintiffs complain that the defendant, in selling them this land, represented to them that it was well adapted to commercial orcharding. That is a shorthand rendition of the allegations charged. They also charge that it was represented to them that the land was worth $275 an acre, that is, it was worth $275 an acre or more. Those, or either of them, one of them, at least, must be maintained by the greater weight of all the evidence,

considered by you, or plaintiffs would not be entitled to a verdict.

Defendant denies that those representations were made, or, rather, I think counsel in his final argument did admit that the representation as to the adaptability of the land for commercial orcharding was made, because it was in the book. He was fair and frank with you to that extent.

The first rule of law is that the representations must be proved before you by the greater weight of the evidence. That is for you to determine. First: The representation that the land was well adapted to commercial orcharding, that is clearly in the book, there is no dispute about that. Counsel, in his final argument for the defense, admitted that before you. But, aside from its being in the book, Mr. Hanson testified that Mr. Amblad, the agent of the defendant, made the same representation to him down in Minnesota, when he was selling him the land. And the witness Amblad denied it. It is for you to determine where the truth lies in that respect. Which one is most probably telling the truth before you, the plaintiff, who says that Amblad told him the land was worth $275 an acre, and was going up, and was really worth more? Is that to be taken as true? Or is Amblad's denial to be taken as true? Unless you find it is proven before you by the greater weight of the evidence—and the only evidence is the plaintiffs' [105] statement of it, except what you may gather from the commendation of the lands in the defendant's book—you would find for the defendant, unless you

find that proven by the greater weight of the evidence.

Then, if the representations were made, and that in respect to the land being adapted to commercial orcharding was made, the next rule of law is that it must appear by the greater weight of the evidence in the case that those representations, or at least one of them, was false. That is the big question in the case for you, Gentlemen of the Jury. Were those representations, or either of them, false? In asking yourself that, you take into consideration all the evidence that both parties presented, remembering that they must be proven false by the greater weight of the evidence, or the plaintiffs are not entitled to recover.

Now, as to the adaptability of the land. Plaintiffs present their witnesses, several buyers from the defendant on these Rio Linda lands. They lie right out here some ten or twelve miles from the city. They testify they tried to grow trees. They tell you that for the first year or two they did very well, and then that they began to show lack of thrift, and died. They impute it to shallowness of soil. Eighteen inches—less than that. I think the plaintiffs' land, itself, is shown to be by the testimony about nineteen inches in depth, if I remember Mr. Davis' testimony. On some it was less, and on some it was more. They all agree that the general character of the land, the depth of the soil and the hard-pan is practically uniform, save and except that in places there will be variations through local causes of considerable consequence. These wit-

nesses tell you that their trees died. They stated that they gave their trees proper care. They impute it to the shallowness of the soil. [106]

The plaintiff then presents Mr. Davis, who comes before you as an expert, the same as the defendant has its expert, Mr. Twining.

An expert is one who represents himself as having special knowledge upon a subject which is not open to ordinary observation, and requires study and experiment; then they come and testify to you, and they even express opinions.

The rule in reference to experts is like that in reference to other witnesses. You are not obliged to believe it is so simply because they swear it is so; you are not obliged to accept their opinions. In so far as you believe they have the necessary learning and knowledge, and have honestly reported to you, you give them respect and credit that far, and no further.

Now, what do we find here about the experts? We find the experts differing very much. Mr. Davis says the soil is an average of nineteen inches on plaintiffs' land, and it lacks the necessary food elements vital to any vegetation, and particularly for fruit—potash and phosphoric acid. He told you the amount he found on his analysis. He told you that his learning is, taught in the University of California, and by authorities, that five feet of soil is necessary for a successful orcharding enterprise.

You will remember, the question here is not whether the land will grow trees, whether the land will produce fruit; but the question here is whether

it will grow them and produce fruit to that extent that it will make a successful commercial enterprise. A commercial orchard may be taken to be one that, with reasonable care and labor, will produce such reasonable crops for such a period of time that, at reasonable markets, the whole enterprise, throughout its career, will have returned a profit. That is the same with any business. Any business must liquidate the overhead. The orchard [107] will not come into bearing, so the book says, before five to ten years. That is perfectly obvious; we all know that. So there is the expense up to that time. The orchard must not only grow trees and grow fruit, but it must grow the fruit long enough to pay the expense of getting it up to the point of bearing, and it must pay interest, and it must pay taxes, and make a return that will represent a profit over its life.

Mr. Davis says this land will not do it, the soil is too shallow, it has not sufficient depth to furnish the plant food, to afford drainage, and to conserve moisture.

Mr. Davis says the hard-pan, being impervious to water, is too deep to blast through it. Blasting the hard-pan on this land, eighteen feet deep, will only make a pothole, he says, which will not afford drainage, and that water will collect therein and drown the roots of the trees, and the trees will die.

He tells you that in his practical experience at Antelope, adjoining this land, seven years in a large orchard, some 150 acres, he managed them, owned them, and he proved it there. It is true he was

taught otherwise in school. But hope springs eternal; youth is optimistic. Mr. Davis went out and experimented to see if he could not overcome what he was taught in school. He is wiser now. He paid some $47,000, according to his statement, in seven years, to prove that it was a failure on this land adjoining Rio Linda, land three to four feet deep, and underlaid with hard-pan.

Mr. Davis states to you his opinion that these lands are not adapted to successful orcharding.

Now, the defendant resists that case. It presents witnesses who also live out in the Rio Linda lands. They tell you the time they have been there, what trees they have grown, how well they have done, what returns they have received, and express the [108] opinion that it is adapted to commercial orcharding. Some have been present and have grown trees for quite awhile. Mr. Turkelson, for one. It does develop that Mr. Turkelson's land averages five feet, some of it less, and some of it deeper, to make up the average. They have told you the amounts they raise for such time as they have mentioned to you. It will be for you to determine whether that indicates evidence of commercial orcharding, or not.

Mr. Morley has an orchard in Arcade, and knows about other orchards. He tells you about his trees, and about his crop this year and last year. Mr. Morley told you how much he got for a year or two. He did not say how much it cost him to raise those crops. His evidence is before you in general terms, to be given such weight as you think it is entitled to.

Mr. Twining testified as an expert for the defendant. He tells you that he knows of orchards on hard-pan land generally like this, shallow soil, in Fresno, Merced, Oroville, and elsewhere, and that when the soil is prepared by blasting, that then it will be adapted to successful orcharding. He says that to blast the hard-pan opens it up and the roots can penetrate. Evidently, shallow soil is not enough for successful orcharding. Mr. Twining evidently agrees that far with Mr. Davis, because he says it must be broken up by blasting. Where you have not got five feet you proceed to make more by blasting. You will remember, Gentlemen of the Jury, that when these lands were represented to the plaintiffs as well adapted to commercial orcharding, it was represented that they were well adapted now —not that they could be made well adapted if you break up sufficient of the hard-pan by blasting. You will remember that this blasting is somewhat costly. Mr. Davis says that it will cost from 60 cents to 75 cents a hole to blast, and that there are from 80 to 100 holes to the acre. That makes a pretty big item. [109] The representation was that the land is—not that the land can be adapted by further exertions in the way of blasting.

Mr. Twining says this soil has more of those necessary elements of potash and phosphoric acid than Mr. Davis says, some five, six, or seven times more, he finds; or, to put it the other way, Mr. Davis finds one-fifth, one-sixth, or one-seventh of what Mr. Twining finds.

Mr. Twining seems to intimate, at least, that Mr.

Davis' analysis and method is not accurate. It is a method that was used but recently. Scientific analysis is supposed to be accurate. Two and two make four just as much this year as it did 100 years ago. Scientific analysis accepted and recognized twenty-five years ago ought to be considered pretty good authority yet.

Mr. Twining says that official chemists have another one now. Mr. Davis says that the American Association of Chemists, which is not limited to the few that work for the Government, recognize the old test, as well as other tests. So it will be for you to say whether Mr. Twining is a better authority on these vital elements in the soil, or Mr. Davis, or where the truth lies between them.

Mr. Twining further says that on this particular land the hard-pan is not as hard as Mr. Davis says. He says there is only two or three inches of real hard-pan, the top of which is impervious to water, and that can easily be broken by blasting, and that below that the hard-pan is soft, and will disintegrate, and is just as good as the top soil.

Mr. Davis, however, says that his experience in Antelope was that to throw this lower hard-pan up on the surface, in four years it is still lying there in the form of rock, and it has not disintegrated, like Mr. Twining says, in his judgment, it will do.

Mr. Davis says the hard-pan is exposed in various places [110] in the Rio Linda land, and, in spite of that exposure, it has not disintegrated, at all.

There, again, you will determine which one you will give the most credit to.

Mr. Twining tells you that, in his judgment, this land, by blasting, can be made to be and will be well adapted to commercial orcharding.

So now, Gentlemen, it is for you to determine. Does the greater weight of the evidence make it appear that the land is not well adapted to commercial orcharding? If it does, the plaintiffs' case is thus far made out.

And, as to the value of the lands, whether the false representations which the plaintiffs charge were made, and which Mr. Amblad, on behalf of the defendant, denies were made. The plaintiffs' expert, Mr. Kerr, with twenty-odd years' experience in dealing with lands in and about your city, says those lands, in 1921—and you will remember that that is the test, that is when the bargain was made; it is not now, it was in 1921—were worth $50 as to one part and $75 as to another part, or an average of $62.50.

Mr. Geddes, for the defendant, says that these lands were worth $350 an acre. You heard the arguments of both sides in respect to that. Which is more reasonable, in the light of all the circumstances, as you know them? These men are expressing opinions. Whether they are both as well qualified to express an opinion is for you. The opinion of the witness is only deserving of weight in so far as you believe the witness is qualified to express it. It is for you to say in respect to these witnesses how they can vary so much that evidently both are not equally qualified, or both are not of equal knowledge, or they both are not equally hon-

est. It is for you to determine where the difficulty is between them, and which you [111] will accept, or whether you will strike a medium between them. You are not obliged to take the judgment of either of them. All the evidence is before you in respect to all the circumstances, and from your general knowledge you have a right to determine for yourselves what the value of the land was. Unless it appears by the greater weight of the evidence that the lands were worth less than $275 an acre, the plaintiffs are not entitled to recover anything. If they were worth as much as he paid for them for any purpose, he would not be damaged, and he would not have any right to recover, here. If, however, you find by the greater weight of the evidence the lands were worth less than $275 an acre in 1921, the plaintiffs' case is thus far made out, and we proceed to the next step—and that is a rule of law, which says, that the defendant, even then, is not liable unless it knew one or the other of those representations were false, if they were both made, or should have known, was neglectful in not knowing, or made them in a positive fashion, and it will not be permitted to deny knowledge at this time. Remember, Gentlemen, that at that time the defendant had had these lands for eight, or nine, or ten years. Its book says that it sold the first tract out there in 1912. It had been gathering settlers that long on these lands. It had experts in its employ. It speaks by its advertising. This book says so, Expert Horticultur*al*ist.

An expert horticultur*al*ist is one who knows, and

whether or not it is adapted to successful commercial orcharding. That is his business. It had other experts. If it did not know it, why didn't it know? If it was holding these lands out and taking people's money for them on the representation that they were adapted to successful orcharding, was it not neglectful if it did not know? Furthermore, it asserts in the book—and I suppose, Gentlemen, this famous letter is still here—it says in one letter, which [112] it makes its own, and assumes to be a letter, it is stated positively that it is proven beyond doubt the lands are well adapted to the raising of deciduous fruits commercially.

Positively, "proven beyond doubt"—there is is nothing stronger than that, Gentlemen of the Jury. As a matter of fact, nothing can be proven beyond doubt. But that is a very positive assertion in kind to impress, and, as counsel in his final argument for the defendant fairly admitted to you that that book was put out to impress those whom they wanted to buy the land. So when the defendant says it is positively proven, it is bound to know the condition of the land. If that representation is false, that the land was well adapted to commercial orcharding, the law imputes to them the knowledge, and they are liable accordingly.

If you find by the greater weight of the evidence that the defendant knew, or was negligent in not knowing, or made that positive assertion—and it did, then the plaintiffs' case is so far made out, and you proceed to the next step.

It must appear by the greater weight of the evi-

dence that the defendant intended the plaintiffs to believe them, and that the plaintiffs relied on them and were influenced by them. And counsel for the defendant, in his final argument, frankly admitted that that is what they did. That is only common sense and plain reasoning. Anyone who says they were not intending that would be assuming that you were ignorant. What does anyone put out an advertisement for except to persuade people to believe the statements made therein, and to persuade them to buy? So that part of the plaintiffs' case is made out.

Then there is another rule of law necessary in plaintiffs' case, and that is, that it is necessary that it appears by the greater weight of the evidence before you that plaintiffs did believe [113] them and rely upon them, and in whole or in part were influenced and induced to buy the lands because of them. Now, again, you apply your common sense to that proposition. Why should he not believe the representation in the book, and the representation of Amblad, if Amblad made representations? The book is enough, so far as the adaptability of the land to commercial orcharding is concerned. They were down in Minnesota. They did not know anything about California, California fruit lands, or fruits, or how to raise them. He was a worker in the Ford factory. He says he believed them. That sounds reasonable and natural. The wife says she believed them, also. He says that believing it, it influenced him. He believed the representation the land was well adapted to fruit farming, commercial orchard-

ing, and believes it was worth $275 and more an acre, and going up. The book says it is going up to $3,000 an acre when the orchard is in bearing. On the strength of that he says he bought it. If that appears to be reasonable, and proved to you by the greater weight of the evidence, their case is made out. The law says that on the representations made by one to induce another to buy, the inference can be drawn that they did induce him to buy, that he was influenced by it. On the other hand, if you do not believe that those representations influenced the plaintiffs to buy, if you do not, by the greater weight of the evidence, find that they did influence them to buy, then, of course, the plaintiff has no case, because, no matter what false representations are made, if they do not influence them, if they are no inducement to make the bargain, they have not damaged them. He made the purchase for other reasons. They say they bought on the strength of those representations. Thus, if you find them proven, then the next question is, were the plaintiffs damaged? That comes right back to the question of the value of the land. [114]

If the land was worth as much as the plaintiffs paid for it they did not lose anything, no matter what the representations were. They got value received. It is only when they did not get value received that, in spite of any fraud, they have the right to recover from the party who sold it to them. If you find that it is proven by the greater weight of the evidence that the land was worth less than $275 an acre when the plaintiffs bought it in 1921,

you give the plaintiffs, as their damage, the difference between what you find the lands worth at the time and what they paid for them. By way of illustration, and by way of illustration only, if you find that they were worth $100 an acre, you would give the plaintiffs $175 an acre. If you find that the lands were worth $150 an acre, you would give the plaintiffs $125 an acre. If you find that the lands were worth $200 an acre, you would give the plaintiffs $75 an acre. In other words, you are just to make them whole, if you find that they got less than what they paid for.

But that is not quite all the case, Gentlemen of the Jury. It appears that the plaintiffs purchased this property away back in 1921, in November of 1921, They came out to see the place in October, 1922. The law is that one who has been defrauded into buying land, as the plaintiffs say they were, must bring their suit within three years after they discover the fact that they have been defrauded, or within three years after they discovered facts which ought, in the judgment of the jury, to have put them on notice, and which, had they pursued the inquiry with diligence, would have made them acquainted with the proof that they had been defrauded. That will be for your determination. They came on the land in 1922. The plaintiff had found out before he came that there was hard-pan on the land. But, of course, that is not alone the defendant's contention, even to-day, the defendant insists that that hard-pan is [115] no detriment to the land so far as fruit growing is concerned. You can see that it is

a matter not only of disputed opinion, but you must settle the disputations between experts.

The plaintiff testified that he went to see Amblad about what he had heard. He did not know what hard-pan was. He had farmed to some extent, back in Wisconsin, on a general farm. So he told Mr. Amblad about it, and Mr. Amblad said to him, "Yes, there is hard-pan there, but it is not detrimental to the raising of fruit." He says he believed Amblad. Amblad was the same party that made the representations to him at the beginning of the bargaining, was a representative of the company, and the plaintiff was still confident that they were dealing fairly with him.

There is a presumption that all transactions are fair and regular; but that presumption, however, may be overcome by the circumstances disclosed in the evidence before you. It is also true that fraud is never presumed, but you may infer it from the evidence and the circumstances before you. He said—inferentially, at least, he had confidence in the truth of this representation.

So he came out here in October, 1922, and he did some work on the land, in the course of which he struck the hard-pan in sinking holes. Finding it there, he then said that it was hard on the surface, and a little softer below. He developed it in his well pit, and found it eighteen feet deep. Then what did he do? He took the advice of the book. The book says, "Consult our expert horticultur*alist*, Mr. McNaughton." The plaintiff says he did go to see Mr. McNaughton, and asked Mr. McNaughton

if that was still all right for raising fruit on that land. He says that Mr. McNaughton said, "Yes, that is volcanic ash; it is a good thing it is there; trees need that; if you blast it the roots will penetrate, and water and air will slack that hard-pan." [116]

Again he says he believed it. When you ask yourselves whether he did believe it, ask yourselves why he shouldn't believe it? He still had confidence in the fairness of the company. Mr. McNaughton was the company's trusted agent, to whom the settlers were instructed to go. No one would intimate, perhaps, that that was to keep him from getting information elsewhere, but still that is a circumstance which might well appear.

So he goes to the company's expert, and the company's expert quiets his suspicions, if he had any, gives him reassurance that it was all true, that this hard-pan was valuable, and necessary to contribute to the growth and the productiveness of the trees. He says he believed it. He made no further inquiry, he says. You ask yourselves whether a person in his position ought to listen to every rumor that might pass around, if there was any. He says he heard none. He heard nothing derogatory to the land until after the time when his suit would be in time, February, 1925. He says, though, that in 1925, having been living on the land, but always working in town, himself—you have a right to bear that in mind, Gentlemen—he says that in 1925 he proceeded to plant trees. He planted some also in 1926—no, in 1925. The first year he says

they did well. That carried him over the time, Gentlemen of the Jury, when his suit would be in time. He says two or three died the next year, several the next year, and several more the next year, and now they don't look so good. He says that until that time he had no reason to believe the soil was too shallow, and would not grow deciduous fruit commercially. Deciduous fruits are those that lose their leaves every year. He says he did not find out that these representations made to him were false until after February, 1925. His wife says the same thing. If you find by the greater weight of the evidence that that is made out, his suit is in time, [117] and he is entitled to recover at your hands. He was only required to make inquiry when his suspicions were aroused; and if the company's representative allayed his suspicions, and there is no denial that Mr. McNaughton said that—McNaughton has not been called to deny it; so, as I say, if that was a suspicion, and if the company allayed his suspicion, that excuses him for the time being from any further diligence on his part to attempt to prove it false, unless you believe that a prudent man would not have given it any credence whatever. Remember that a person who thus buys, where it seems to be a matter of expert knowledge, remember that the defendant is still maintaining that the land is adapted to commercial orcharding, and this expert of the defendant, also. The party buying the land does not have to go out and hire experts to see if he can prove that that which

was represented to him was false, and on the strength of which he bought the land.

So, Gentlemen of the Jury, if you believe these elements of the plaintiffs' case proven by the evidence before you by the greater weight of it, they are entitled to recover, and you will find for them accordingly.

There was one more item of damage. The land represented to be adapted to commercial orcharding, growing deciduous fruit-trees, the plaintiff tried it out. He says he spent $45 for planting the trees, and $40 in cultivating them before he discovered it was no use, that the trees did not flourish. He would be entitled to whatever he thus reasonably expended. The rule is that if one party sells to another something, and represents it to be adapted to a special use, or a special purpose, and if that representation is false, as I have heretofore explained it to you, whatever money is reasonably spent in attempting to put it to that use may be recovered.

When you retire to your jury-room, Gentlemen, you will [118] select one of your number foreman and proceed to arrive at a verdict.

Exceptions for plaintiffs?

Mr. McCUTCHEN.—None.

The COURT.—For defendant?

Mr. BUTLER.—We except to the instruction upon the subject of representation claimed to have been made to plaintiff by defendant, both as to the growing of fruit, and the question of value.

An exception to the instruction on the question

of false representation and knowledge of the falsity on the part of the defendant.

We save an exception to the Court's instruction upon the definition of a commercial orchard.

We also except to the instruction regarding the question of belief on the part of the plaintiff, and reliance thereon.

Also to the instruction regarding the present adaptability of the soil.

Also an exception to the instruction concerning the question of the date of discovery under the statute of limitations.

We also except to the failure of the Court to give defendant's proposed exception No. 1, upon the matter of the statute of limitations.

We also except to the failure of the Court to give defendant's proposed instruction No. 2, concerning the effect of the discovery by plaintiff of the falsity of material representations.

We also except to the failure of the Court to give defendant's proposed instruction No. 4, concerning distinctions between representations and matters of opinion.

We also except to the failure of the Court to give defendant's proposed instruction No. 5, concerning the effect of plaintiffs having been able, by reasonable diligence, to discover [119] the alleged falsity of representations as to value.

We also except to the instruction that the defendant, by its booklet, represented plaintiffs' land to be well adapted to the growing of deciduous fruit commercially. And also to the instruction that the

statements in the defendant's literature apply to the land purchased by plaintiffs.

The COURT.—Gentlemen of the Jury, it is late, and I will be leaving the building. You will proceed to deliberate and arrive at a verdict. When you have thus arrived at a verdict, your foreman will sign it, seal it, and put it in an envelope, and keep it in his pocket, and you may disperse to your homes, returning to court to-morrow morning at ten o'clock to report your verdict. You will, remember, of course, to keep secret whatever conclusion you have arrived at. And remember, Gentlemen, you do not separate until you have arrived at a verdict.

(Thereupon the jury retired, and subsequently returned into court and rendered a verdict in favor of the plaintiffs and against the defendant, and assessed the damages in the sum of $2,000.00.)

Defendant proposes the foregoing as its bill of exceptions on appeal from the judgment in said cause, and prays that it be allowed and settled as such.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant.

Dated: November 27th, 1928. [120]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions do not appear in the record of said cause, I, ————, Judge of the District Court, upon the stipulation of the parties, have settled and signed the said bill, and have ordered that the same with amendments accepted and allowed, be made a part of the record of the said cause, this 20 day of Dec., 1928.

BOURQUIN,
Judge.

[Endorsed]: Filed Dec. 27, 1928. [121]

[Title of Court and Cause.]

PROPOSED AMENDMENTS TO PROPOSED BILL OF EXCEPTIONS.

Come now the plaintiffs and propose that defendant's proposed bill of exceptions be amended as follows:

1. Page 48, line 22, in place of "a quantitative" insert "an authoritative."

2. Page 52, line 20, insert the following: "The cause was thereupon argued to the jury. During the course of the argument counsel for the defendant admitted that defendant by its literature had represented to plaintiffs that the piece of land which they purchased was proven beyond a doubt

to be well adapted to the raising of fruit commercially and that this representation had been made for the purpose of inducing plaintiffs to buy the land."

(Allowed. See charge unquestioned.—BOURQUIN, J.)

3. Page 67, line 15, after "Kerr" insert "with" and after "odd" insert "years."

4. Page 69, line 1, after "stated" insert "positively" and strike out the same word in line 2, page 69.

5. Page 69, line 4, take the word "positively" out of quotation marks and insert after it a comma.

6. Page 73, line 5, correct "entrusted" to read "instructed" and "indicate" to read "intimate." [122]

Dated: December 3, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

Due service and receipt of a copy of the within proposed amendments to proposed bill of exceptions is hereby admitted this 3d day of December, 1928.

EDWARD P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 5, 1928. [123]

[Title of Court and Cause.]

NOTICE OF REJECTION OF PROPOSED AMENDMENT TO PROPOSED BILL OF EXCEPTIONS.

To the Above-named Plaintiffs, and to Messrs. Ralph H. Lewis and George E. McCutchen, Attorneys for Said Plaintiffs:

PLEASE TAKE NOTICE: That defendant does not accept your proposed amendment No. 2 to its proposed bill of exceptions.

That proposed amendments, numbers 1, 3, 4, 5 and 6 are accepted.

Dated: December 6, 1928.

ARTHUR C. HUSTON,
E. P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 17th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 18, 1928. [124]

[Title of Court and Cause.]

STIPULATION WAIVING NOTICE OF PRESENTATION OF PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that defendant's proposed bill of exceptions in the above-entitled cause, with plaintiffs' proposed amendments thereto, and defendant's notice of rejection thereof, except as to the proposed amendments which have been accepted, may be presented to Hon. George M. Bourquin, who presided at the trial of the above cause, for settlement, without further notice or argument.

Dated: December 8th, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.
ARTHUR C. HUSTON,
E. P. KELLY,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Dec. 18, 1928. [125]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND COST BOND.

On the filing by defendant of a petition for appeal, with assignment of errors, and on motion of

defendant, by its attorneys, IT IS HEREBY ORDERED:

That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered herein be, and the same is hereby, allowed.

AND IT IS FURTHER ORDERED that upon the giving by defendant of a good and sufficient bond, in the sum of Four Thousand ($4,000.00) Dollars, and conditioned as required by law, and the rules of this court, all further proceedings in the said court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals or by the Supreme Court of the United States upon a petition for writ of certiorari.

IT IS FURTHER ORDERED that the amount of cost bond on said appeal be, and it hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned as required by law and the rules of this court.

The supersedeas and cost bond may be embraced in one document.

A. F. ST. SURE,
United States District Judge.

Dated: December 5th, 1928. [126]

Service hereof is hereby admitted and receipt of copy acknowledged this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 7, 1928. [127]

[Title of Court and Cause.]

SUPERSEDEAS BOND AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Sacramento Suburban Fruit Lands Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, and authorized under the laws of the State of California and the above-entitled District, to act as sole surety on undertakings of this character, as surety, are held and firmly bound unto J. H. Hanson and Jennie B. Hanson, the above-entitled plaintiffs, in the full and just sum of Four Thousand Two Hundred Fifty ($4,250) Dollars, to be paid to the said J. H. Hanson and Jennie B. Hanson, their attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of December, 1928.

WHEREAS, lately at a District Court of the United States [128] for the Northern District of California, Northern Division, Second Division thereof, in a suit pending in said court between said J. H. Hanson and Jennie B. Hanson, as plaintiffs, and Sacramento Suburban Fruit Lands Com-

pany, as defendant, a judgment was rendered against the said Sacramento Suburban Fruit Lands Company in the sum of Two Thousand ($2,000.00) Dollars, and in the further sum of costs amounting to $33.10, and the defendant having been allowed an appeal from the judgment to the United States Circuit Court of Appeals for the Ninth Circuit; and the Court having made an order for supersedeas staying all proceedings in the District Court pending final determination of said appeal, provided the defendant give a bond in the sum of Four Thousand ($4,000.00) Dollars, conditioned according to law; and the Court having fixed the amount of cost bond on said appeal in the sum of Two Hundred Fifty ($250.00) Dollars; and the Court having ordered that the supersedeas bond and bond for costs might be combined and embraced in one document,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Sacramento Suburban Fruit Lands Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

AND IT IS FURTHER EXPRESSLY AGREED by said surety that in case of a breach of any condition hereof, the above-entitled court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the action in which this bond is given to ascertain the amount which said surety is bound to pay on account of such breach,

and to render judgment therefor against it and to award execution therefor. [129]

IN WITNESS WHEREOF, said principal and surety have executed this undertaking, attesting such execution by their respective seals, all on this, the 8th day of December, 1928.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation.

[Seal] By A. E. WEST.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation.

[Seal] By J. W. S. BUTLER, Attorney-in-fact.

State of California,
County of Sacramento,—ss.

On this 8th day of December, 1928, before me, a notary public in and for the county of Sacramento, State of California, personally appeared J. W. S. Butler, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Standard Accident Insurance Company, and he acknowledged to me that he subscribed the name of Standard Accident Insurance Company thereto, as principal, and his own name as the attorney-in-fact.

[Seal] GERALD M. DESMOND,
Notary Public in and for the County of Sacramento, State of California.

Form of bond and sufficiency of sureties approved.

Dated: Dec. 11, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 12, 1928. [130]

[Title of Court and Cause.]

ORDER TRANSMITTING EXHIBITS.

It appearing to the Court that the exhibits of plaintiffs and defendant, except the perishable exhibits and samples of hard-pan, should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit in their original form,—

IT IS HEREBY ORDERED that said exhibits, except the perishable exhibits and samples of hard-pan, be transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit in original form, with the bill of exceptions, and need not be printed as part of the record herein.

Dated: January 14th, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 14, 1929. [131]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare a record on appeal contain-

ing true copies of the following papers in the above-entitled action:

1. Order removing said cause from the Superior Court of the State of California to the District Court of the United States.
2. Complaint.
3. Demurrer to complaint.
4. Order overruling demurrer.
5. Answer.
6. Minutes of trial.
7. Verdict of the jury.
8. Judgment.
9. Petition for appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Proposed amendments to bill of exceptions.
13. Notice of rejection of proposed amendments.
14. Stipulation waiving notice of presentation of bill of exceptions.
15. Order allowing appeal.
16. Citation.
17. Supersedeas and cost bond.
18. Order transmitting exhibits.
19. Praecipe for transcript.
20. Amended complaint.
21. Demurrer to amended complaint.
22. Order overruling demurrer to amended complaint.

J. W. S. BUTLER,
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant. [132]

Service hereof is hereby admitted and receipt of copy acknowledged this 22 day of January, 1929.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 22, 1929. [133]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 133 pages, numbered from 1 to 133, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of J. H. Hanson et al. vs. Sacramento Suburban Fruit Lands Co., No. 475 —Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Fifty-five and 25/100 ($55.25) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said District Court, this 1st day of Feb., A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [134]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to J. H. Hanson and Jennie B. Hanson, Appellees, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Sacramento Suburban Fruit Lands Company, a corporation, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated: This 5th day of December, A. D. 1928.

A. F. ST. SURE,
United States District Judge. [135]

Due service of within citation is hereby admitted this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Appellees.

Citation on Appeal. Filed Dec. 7, 1928.

[Endorsed]: No. 5705. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Suburban Fruit Lands Company, a Corporation, Appellant, vs. J. H. Hanson and Jennie B. Hanson, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed February 2, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

J. H. HANSON and JENNIE B. HANSON,
Appellees.

BRIEF FOR APPELLANT.

BUTLER, VAN DYKE & DESMOND,
Capital National Bank Building, Sacramento,
EDWARD P. KELLY,
Metropolitan Bank Building, Minneapolis,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 5705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

J. H. HANSON and JENNIE B. HANSON,
Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an action in fraud. Appellees by their complaint, which appears on pages 1 to 7 and pages 10 to 13 of the Transcript, allege that when the cause of action arose they were residents of the State of Minnesota, wholly unfamiliar with California farm and fruit lands; that to induce them to purchase land from appellant it falsely and fraudulently represented to them that all of the ten acre tracts of land in Sacramento, California, then being sold by it were of the fair and reasonable value of two hundred seventy-five ($275.00) dollars per acre, and that all of the land thereof was rich and fertile, capable of producing

all sorts of farm crops and products, entirely free from all conditions and things injurious or harmful to the growth of fruit trees, perfectly adapted to the raising of fruits of all kinds in commercial quantities, capable of producing large crops of any kind of deciduous fruit planted thereon, and that such crops would be of the finest quality; that these same representations were made in respect of lot number twenty-two (22) of Rio Linda Subdivision No. five (5), one of the tracts of land above mentioned; that, relying upon these representations, both as to quality and as to value, they purchased said lot, consisting of ten acres of land at the price of two hundred seventy-five ($275.00) dollars per acre; that it was actually worth but fifty ($50.00) dollars per acre, and that the representations above stated as to the quality of the land were all false; that upon these representations they purchased the land on November 1, 1921; that in reliance upon the representations they expended certain money for improvements; that this money was largely lost because of the falsity of the representations; that appellant should be subjected to punitive damages, and the complaint concluded with the prayer for judgment in the sum of approximately ten thousand ($10,000.00) dollars.

The action was filed February 29, 1928, six years and four months after the cause of action arose. To meet the apparent difficulty that the cause of action was barred by the statute of limitations when filed, appellees allege: "that plaintiffs did not discover the falsity of said representations or any of them until about the month of February, 1928."

A demurrer was interposed to this pleading and the same was sustained. Whereupon appellees filed an amendment to their complaint, designed to meet the objection that the cause of action was barred. By that pleading, which appears on pages 10 to 13 of the transcript, they alleged in substance as follows: That all the lands adjoining the lands purchased by appellees had been sold by appellant to persons formerly residing at points distant from California; that it was generally believed in the locality of said lands in February, 1927, that the same were fruit lands of the value of three hundred fifty ($350.00) dollars per acre and upwards; that appellees did not plant any fruit trees until the spring of 1925, at which time, it is to be observed, they had been upon the property approximately two and a half years, it being proven by their own testimony (Transcript, page 48) that they had moved to California and occupied the land on November 1, 1922. Appellees further allege that the trees appeared to do well during the balance of the year of planting, but some died in 1926; more in 1927. Appellees being advised that some trees do die in any soil, did not therefrom discover the falsity of the representations; that plaintiffs had no occasion to borrow money on the property, save from the appellant or through its arrangements; that they never discussed the value of the property with any real estate broker, salesman or banker, save that in 1927 they made a statement of assets to a banker which took no exception to the valuation of $275.00 per acre placed upon the land they had purchased.

Appellees further alleged that though others holding surrounding lands complained that fraud had been practiced upon them, which happenings occurred in 1927, they themselves did not believe the statements until suits were filed and one of them tried, resulting in a judgment for plaintiffs upon the ground of fraud. Whereupon these appellees say they discovered, in February, 1928, that they had been defrauded.

To these amended pleadings appellant interposed a demurrer (Transcript, page 14), pleading the bar of the statute of limitations, and, generally, that the complaint as amended stated no cause of action, and this demurrer was overruled. (Transcript, page 15.) Appellant answered, denying the material allegations of the complaint, and the amendment thereto. The case was tried to a jury, and on October 17, 1928, the jury returned a verdict in the sum of two thousand ($2000.00) dollars. From the judgment entered thereon this appeal has been taken.

The questions presented involve errors alleged to have been committed in the proceedings below in the overruling of appellant's demurrer, in denial of appellant's motion for a directed verdict, in the admission of testimony over the objection and exception of appellant, in the charge of the Court to the jury, and in the refusal of the Court to give instructions requested by appellant, all of which matters appear more fully in the specifications of errors next herein stated.

SPECIFICATIONS OF ERRORS RELIED ON.

(1) The Court erred in overruling appellant's demurrer to the complaint as amended in the above entitled cause.

(See Assignment of Errors, page 30 of Transcript, Assignment No. I.)

(2) The Court erred in overruling an objection to a question asked the witness Davis.

(See Assignment of Errors, page 30 of Transcript, Assignment No. II.)

(3) The Court erred in overruling the appellant's motion for a directed verdict.

(See Assignment of Errors, page 30 of Transcript, Assignment No. III.)

(4) The Court erred in instructing the jury on the question of appellant's knowledge of the falsity of the alleged representations.

(See Assignment of Errors, page 32 of Transcript, Assignment No. VI.)

(5) The Court erred in instructing the jury upon the definition of a "commercial orchard."

(See Assignment of Errors, page 33 of Transcript, Assignment No. VII.)

(6) The Court erred in instructing the jury on the question of present adaptability of soil to the raising of fruit.

(See Assignment of Errors, page 35 of Transcript, Assignment No. IX.)

(7) The Court erred in instructing the jury on the question of the time of the discovery of the alleged fraud with regard to the statute of limitations.

(See Assignment of Errors, page 36 of Transcript, Assignment No. X.)

(8) The Court erred in refusing to instruct the jury upon the question of the statute of limitations, as requested in appellant's proposed instruction No. I.

(See Assignment of Errors, page 40 of Transcript, Assignment No. XI.)

(9) The Court erred in refusing to instruct the jury concerning the effect of the discovery by appellees of the falsity of material representations, as requested in appellant's proposed instruction No. II.

(See Assignment of Errors, page 42 of Transcript, Assignment No. XII.)

(10) The Court erred in refusing to instruct the jury concerning the effect of appellees having been able by reasonable diligence to discover the falsity of the alleged representations as requested in appellant's proposed instruction No. IV.

(See Assignment of Errors, page 43 of Transcript, Assignment No. XIV.)

(11) The Court erred in instructing the jury that appellant by its booklet represented the land sold to appellees to be well adapted to the growing of deciduous fruits commercially.

(See Assignment of Errors, page 44 of Transcript, Assignment No. XV.)

(12) The Court erred in instructing the jury that the statements in appellant's literature applied to the lands purchased by appellees.

(See Assignment of Errors, page 44 of Transcript, Assignment No. XVI.)

ARGUMENT.

THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE COMPLAINT FILED IN THE ABOVE ENTITLED ACTION.

We have hereinbefore referred to the portions of the record wherein appears the complaint and the amendments thereto, and the demurrer interposed by appellant. The demurrer was both general, and, in addition, set up the statute of limitations. This statute of limitations is found in the California Code of Civil Procedure, being Subdivision 4 of Section 338 thereof, and reading as follows:

> "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:
>
> *Within three years:*
>
> An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

In the case of *Sacramento Suburban Fruit Lands Company v. Melin,* No. 5671, pending on appeal in this Court, is a full discussion of the rules of law applicable to cases of fraud brought more than three years after the accrual of the cause of action, together with a full citation of authorities upon which appellant relies herein. For the sake of brevity we will not repeat the arguments and authorities advanced therein and quoted, but will state the propositions therein advanced briefly, in support of our claim herein that the Court erred in overruling appellant's demurrer.

This distinction, however, between the *Melin* case and this case should be noted, to-wit, that by an amendment to their complaint the appellees sought to meet the objection herein urged, which effort was not made in the *Melin* case. We submit, however, as we shall hereinafter attempt to show that the attempt made by appellees in this regard was abortive, and that in effect their amendment added nothing to the statement of their cause of action or the answer to the objection that their action was barred by limitation. Probably the best known statement of the rule in pleading such matters appears in *Lady Washington Consolidated Company v. Wood,* reported in 113 Cal. 486. Summarizing from the statements there, but practically quoting them, we find the following:

The right of a plaintiff to invoke the aid of a Court for relief against fraud after the expiration of three years from the time the fraud was committed is an exception from the general statute on that subject and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. *This is an element of the plaintiff's right of action and must be affirmatively pleaded by him in order to authorize the Court to entertain his complaint.* "Discovery" and "knowledge" are not convertible terms and whether there has been a discovery of the facts constituting the fraud, within the meaning of the statute of limitations, is a question of law to be determined by the Court from the facts stated. It is not sufficient to make a mere averment

thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, as that they were done in secret or were kept concealed; and he must show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the Court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of these facts.

Testing the original complaint filed herein, we find the only attempt made by appellees to bring themselves within the rules of pleading above stated is found in paragraph IX of said complaint, wherein it is alleged, "that plaintiffs did not discover the falsity of said representations, or any of them, until January, 1928." The original complaint states nothing whatever in addition to the above quoted words upon this matter.

Referring again to the *Lady Washington* case above cited, we quote the following from the opinion therein as particularly applicable to the situation presented in the case at bar:

"Testing the complaint herein by these rules, it falls far short of showing that the plaintiff is within the exception to the statute, or that its cause of action is not within the apparent bar of the statute * * * It was necessary for the plaintiff to allege not only the facts constituting this fraud, but also the facts connected with its discovery, so that it might appear from the complaint that the action was not barred by the statute of limitations. The only averment by the plaintiff in this respect is that 'it was not informed of and did not know or discover any of the aforesaid frauds, or the facts connected therewith until within six months preceding the filing of the complaint herein.' It is not averred that any of these facts, or of the transactions set forth as constituting the fraud, were done secretly, or were concealed from the plaintiff, or that any information which it sought was refused, or that, indeed, it sought to obtain any information upon the subject."

To this original complaint a demurrer was interposed which was sustained by the Court below and thereupon appellees amended their complaint as hereinbefore noted. We submit that when the amendment is tested by the same rules, it fails as signally to meet the objection as did the original pleading.

We have hereinbefore analyzed the amendment. The averment that the surrounding lands had been sold to persons resident at points distant from California, and that it was believed generally in the locality of the lands up to February, 1927, that they were fruit lands of the value of three hundred fifty ($350.00) dollars per acre and upwards, adds nothing to the pleading. This is so for the reason that it is not alleged that these appellees ever inquired concern-

ing the value of the lands or their adaptability for fruit culture, even from their neighbors, but it does affirmatively appear that appellees "never discussed said property or its value with any real estate broker, salesman or banker" until a period well within the statute of limitations.

It is not alleged, as it could not be alleged, that appellees remained distant from the land they had bought, and that they therefore had no opportunity of making a full investigation concerning the truth or falsity of the representations upon which they claimed to have implicitly relied in the purchasing thereof.

The only other matter alleged has to do with what might be termed a practical test, consisting of the planting of a few trees upon the land in the spring of 1925, but this also occurred within the three years prior to the commencement of the cause of action, and of course does not aid the pleading for that reason, except that it is a statement concerning the time discovery was made. It does not, however, attempt to meet the requirement that the pleading must set out the reasons why discovery was not made sooner. Actual discovery apparently awaited the rendition of a judgment by the Court in favor of a neighbor of appellees, which occurred in February of 1928, just prior to the filing of their suit. The purpose of pleading the facts constituting the discovery is to enable the Court to see whether or not the facts discovered and the nature of discovery could be said to meet the requirement of due diligence in the discovery. The matter is one of law as held in the case above cited.

The significant thing about the story of discovery as told by appellees in their pleading is that it leaves them confessing they had not themselves asked a single question concerning the truth or falsity of the representations relied upon, and confessing that they had not themselves exercised any—even the slightest —diligence to detect their falsity. The story is rather one of being bludgeoned into discovery and conversely shows a deliberate slumbering upon their rights. If the other allegations of their complaint be true, this land they had purchased was totally unfitted for the purpose for which they claimed they bought it, and was of a value of only fifty ($50.00) dollars per acre, as against the two hundred seventy-five ($275.00) dollars per acre which they had paid therefor.

The pleading states a situation discoverable by the most simple inquiries. If appellees had any duty of investigation and inquiry whatsoever it is inconceivable that such inquiry would not have immediately led to information, and certainly their pleading proves they made no inquiry whatever. Analyzed, that is the sum and substance of the matters pleaded in the amendment.

That these appellees were obliged to make seasonable inquiry when they arrived upon the property is demonstrable from the authorities and from the standpoint of reason. They had purchased property from an adverse party in interest, dealing with them at arm's length, and under a situation wherein, because they were distant from the property itself, they may, for the purpose of argument, be conceded the right to rely upon the seller's statements. But in so doing,

they knew, as all prudent people know, that they were taking and relying upon the statements of an adverse party, and were not making any investigation of their own to test the truth of these statements. They knew, as all men know, that sellers are given to exaggeration concerning the quality and value of that which they are offering for sale, and that as prudent buyers they should take these statements with a grain of salt. To be entitled to rely on them in parting with the price of the property, and having the right of holding the seller to the truth of its representations, should they thereafter prove to be false, they are faced with the consequent duty arising at once when seasonable opportunity for investigation presents itself, to make that investigation, and if information easily arrived at is accessible, they are seasonably held to know whatever such investigation would have disclosed. They stand confessed of having made not the slightest inquiry or investigation during the entire period of three years and four months preceding the three years before they filed their action. They do not say in their pleading that they did not have opportunity of investigation, as, of course, they could not honestly say so, since it appears from their evidence as hereinbefore noted that they occupied the property for approximately six years before beginning their action. The adaptability of land to any special use is a matter upon which information can be readily obtained.

But even stronger is the question of value. Upon this matter information sufficient to disclose the startling discrepancy between the price paid and the real value as alleged in the pleading could not but have

been obtained by the least inquiry or effort. If this allegation be true, and it is taken to be true for the purpose of the demurrer, a question asked of a banker, real estate broker or real estate salesman, acquainted with values in the community, could not fail to have informed appellees that they had been defrauded, and, in addition, have informed them of the exact measure and extent of their damage and their cause of action therefor. Armed with that information, it matters not whether they pursue inquiries concerning the condition and quality of the land or its adaptability for a special use or not. They know of their cause of action and the extent to which they have been injured, and knowing this, the statute of limitations begins to run. Far from making such inquiries, and it was apparently in the minds of the appellees, as it must be apparent to any other person, that inquiries of such people are ordinarily required of prudent people seeking information upon such subjects, these appellees affirmatively plead that they did not make such inquiries. The reasoning these people adopted in amending their complaint demonstrates conclusively that they knew, as all men do know, just where they could have obtained the information. They evidently felt that they should have inquired, if they really sought information, of just the sources they named, and felt obliged to state that they did not make such inquiries, because obviously they did not dare to allege they had made them and that the information had not been forthcoming.

So it makes no difference whether or not appellees began a practical test by the planting of trees two and

a half years after they had occupied the property, for certainly they made no practical test of the question of value, and if they failed to show a reason why they could not have discovered that misrepresentation within the period preceding the limitation period, their pleading is as defective as though they had made no effort to discover any misrepresentation. The matter of value misrepresentation was by far the most important of the two. This was demonstrated by the testimony of the only value witness which they placed upon the stand, one Howard D. Kerr, who testified (Transcript, page 67), that if the representations concerning the adaptability of the land for fruit culture had been true, the value of the land would then have been around $125.00 or $150.00 an acre. The greatest injury caused to appellees, then, if their testimony and pleadings be true, was inflicted upon them by the misrepresentation as to value, and upon that point they have not a word to say in their amended pleading in excuse of their failure to discover the misrepresentation for approximately six years and over after moving upon the property and having thus had open to them every avenue of information that existed.

Referring briefly now to the authorities concerning this matter of their duty in the premises, if they wish to hold the appellant responsible for its alleged representations, we refer the Court to the following:

It is held in *Gratz v. Schuler,* 25 Cal. App. 122 (citing *Ruhl v. Mott,* 120 Cal. 668 and *Bacon v. Soule,* 119 Cal. App. 427,) that:

> "Where a party to a contract ascertains that the other party has falsely represented one ma-

terial matter in the transaction, it is notice to him that the representations as to other matters may also be false, and it is therefore incumbent upon him to thereafter make a full investigation as to the truth or falsity of all of such matters."

In *Montgomery v. Peterson,* 27 Cal. App. 675, citing numerous decisions in support of its declaration, the Court said:

> "By passing this point, together with the more serious question of whether or not the complaint was sufficient excuse why discovery of the fraud was not made within three years, we think that the evidence in the case fails utterly to sustain the finding of the Court in favor of the plaintiffs in that regard. Subdivision 4 of Section 338 of the Code of Civil Procedure provides that in the case of fraud or mistake the action must be commenced within three years after the discovery by the aggrieved party of the facts constituting fraud or mistake. Under the cases in this State it is not enough to assert that the discovery was not sooner made. *It must appear that it could not have been made by the exercise of reasonable diligence and all that reasonable diligence would have disclosed, plaintiff is presumed to have known, means of knowledge in such case being the equivalent of the knowledge which it would have produced.*"

There was nothing that was concealed about this fraud, or that could have been concealed. All possible information would have been forthcoming upon inquiry. Peculiarly applicable to the situation of appellees are the remarks of the California Supreme Court in the case of *Johnston v. Kitchin,* 265 Pac. 941, wherein the Court said:

> "What secret, may we ask, could be suppressed that would or could affect the value of a com-

> mercial city lot, the title to which is a public record and its value an open matter of investigation to the entire public? We know of none, and think, in a practical sense, none can exist."

We will close our citation of authorities by quoting from *Angell on Limitations*, Section 187, wherein that learned author says that:

> "If the party affected by any fraudulent transaction or management might with ordinary care and attention have seasonably *detected* it, he seasonably had actual knowledge of it."

What is meant by the expressions "diligence," "investigation," "detection," as descriptive of the obligation resting upon those who claim they did not discover fraud of which they were the victims? Does it mean a slumbering along until bludgeoned into knowledge by the acts of strangers? Of course it does not. And yet that is all which appellees' pleading of facts in excuse of non-discovery amount to. Appellees pleaded, no doubt, as strongly as they dared, but they did not meet the test, as of course they could not meet the test, for it is utterly impossible for an owner of property, presumptively knowing the value thereof, to reside thereon for over three years and then to show by a pleading why he did not during that period discover that the value of it was less than one-fifth the amount he believed it to be when he moved upon it.

Appellees' pleading in this regard is not lacking in elements of humor. Some of their trees died—they suspected nothing. More died—and such suspicions as they might have had apparently died with them. Their neighbors swore to complaints in fraud

before the State Real Estate Commissioner, and the district attorney made "some sort" of investigation. Appellees slumbered on. Suits were filed, and the repose of appellees remained undisturbed. Judgments were rendered on the suits, and at last appellees "considered their land further and * * * discovered * * * that they had been defrauded." As a showing of due diligence we submit the pleading referred to is a masterpiece.

THE COURT ERRED IN OVERRULING AN OBJECTION TO THE QUESTION ASKED THE WITNESS DAVIS.

Herbert C. Davis was an expert witness called to the stand by appellees to prove that their land was not suited for fruit culture. His testimony appears on pages 55 to 62 of the transcript. Among other things, he testified to some practical experience he claimed to have had in the operation of one hundred fifty acres of orchard on lands somewhat similar to the lands of the appellees. It was perhaps permissible for this witness to testify as to the result of this practical experiment in so far as his testimony should be concerned with the amount of fruit grown. But whether or not a profit was made in the enterprise was utterly inadmissible, because those things depend not primarily upon the amount of fruit grown, but upon matters as to which no representation whatever had been made, that is, matters of price and cost of production as resulting from good or bad management. Over objection, however, the witness was permitted to testify that the corporation he worked for during this

practical experiment lost forty-seven thousand dollars in money. The testimony appears on pages 55 and 56 of the transcript, where likewise appear the objection that the evidence was inadmissible because immaterial and without the requisite foundation having been laid, the order of the Court overruling the objection, and the exception of appellant thereto. The Court emphasized this bit of testimony in his charge to the jury, (Transcript, page 124) commenting thereon as follows:

> "Mr. Davis went out and experimented to see if he could overcome what he was taught in school. He is wiser now. He paid some forty-seven thousand dollars, according to his statement, in seven years to prove that it was a failure on this land adjoining Rio Linda, land three to four feet deep and underlaid with hardpan."

We respectfully submit that the introduction of this evidence was error, prejudicial to the appellant.

THE COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT.

We shall discuss this specification of error but briefly, because in substance it has been discussed in the argument upon the matter of the demurrer. As appellees were obliged by the rules of the pleading to show affirmatively that they did not discover the fraud until within three years of the commencement of their action, and, more important still, that they could not by the exercise of reasonable active diligence have so discovered it, or the falsity of any material representation relied on, so they were confronted with the

burden of proving such necessary allegations. The testimony of appellees which of course could alone determine this matter, appears on pages 45 to 52 of the transcript.

Appellees are husband and wife. The husband, upon this matter, gave the following testimony: That he came to California and moved onto the land in the first part of November, 1922. (Transcript, page 48.) That before coming he had talked with Amblad, the agent of appellant, about hardpan, and was told by him that although the hardpan was a constituent of his land, it lay at a depth of from three to six feet below the surface (Transcript, page 47), and that when he went upon the land he encountered this hardpan at from sixteen inches to twenty-two inches below the surface, contrary to the statements of Amblad in respect thereto; that that hardpan he discovered to be eighteen feet thick.

Apparently this aroused his suspicions as to the adaptability of his land for fruit culture, but instead of doing as any prudent man would have done, seeking independent advice, which was, of course, available to him, he went back to an agent of the appellant, so he says, who told him that it was not hardpan, but, on the contrary, was volcanic ash, and a beneficial constituent of the soil. True, he was told it would have to be blasted, and the Court told the jury (Transcript, pages 35 and 36) that this necessity for blasting was proof in itself of misrepresentation since the soil, so the Court said, had been represented as being adapted to fruit culture without such preparation. But, passing that for the moment, it is apparent at

this point that whereas Amblad had told him the substance was hardpan, McNaughton, another agent of appellant, told him it was not, but, on the contrary, was a beneficial volcanic ash needed by the trees. Confronted with these conflicting statements he made no inquiry whatsoever from an independent source. The appellant had told him two things directly contradictory of each other concerning this element of his soil, and he rested.

He then says that he started his practical demonstration but not until several years thereafter, evidently concluding that after his exertions in respect of the investigation clearly indicated he was entitled to a well-earned repose. The rest of his testimony amounts to nothing more than "I did not discover."

He says (Transcript, page 49):

> "Prior to March, 1925, I did not find out that the land was not adapted to raising fruit trees. Nobody in the neighborhood ever told me anything about it. Prior to that time I did not learn that the land was not worth $275.00 an acre. Up to that time I had not borrowed any money on my land, I had not had any dealings with any real estate agents, or with anyone about it."

That is the extent of his testimony on excuse of non-discovery. It should be noted that it does not touch upon the matter of value.

Something further was said by the husband not tending to excuse discovery, but tending to emphasize the fact that he possessed information putting him upon guard, which he ignored. He said (Transcript, page 50,) that before coming to California he had talked with a man who had been out to Rio Linda

and returned therefrom, and that this man told him he hoped he was not buying Rio Linda land; that it was all hardpan; that his father had worked for the appellant, and told him the land was all hardpan; that (Transcript, page 51) when he came to the land he did not see any fruit orchards near his lot, but that the orchards were along the creek near the townsite; that he did not (Transcript, page 51): "talk with any of my neighbors about the soil, nor did I talk with anybody around Sacramento about raising fruit on the land that I had bought."

That on discovering hardpan, he inquired of nobody other than Mr. McNaughton, the agent of appellant.

The wife testified as follows (Transcript, page 52):

> "After we came to California I never found out from anyone before March, 1925, that this land was not good fruit land, or that it was not worth $275.00 an acre. I never found out anything along those lines prior to March, 1925."

We submit that the evidence introduced for the purpose of proving that appellees used due diligence in an effort to discover or detect the alleged falsity of the representations they had relied upon falls even farther short of being sufficient than did their allegations touching this matter, which we have hereinbefore discussed. For, in addition to there being a total want of showing of diligence, there is proof of its lack. There were circumstances which should have put them upon inquiry. They had been told by an independent source that it was unwise to buy this land because it was "all hardpan." They discovered that Amblad's statement as to the depth at which it was to be found

beneath the surface of the soil was false. They had been given conflicting statements in respect of the nature of this soil constituent by the agents of appellant. They affirmatively proved they made no inquiries of disinterested parties about the matter of soil quality, although it was and is apparent that such sources of information were readily available, and turning to the more important representation as to value, their only showing is an affirmative showing that they did not inquire of anyone, not even agents of appellant.

Faced with the burden of showing diligence their frank confession is, "We asked nobody and were told nothing about the value of our land." This showing is so amazing as to justify the conclusion that herein they were not frank. It is inconceivable to us that any man buying land upon an express representation as to market value, can live upon the same for over three years and never have inquired of anyone about the matter.

Value of property in a subdivision being actively marketed is ordinarily the subject of more or less constant discussion. It is unbelievable, we submit, that appellees asked no questions and were told nothing for the three years and four months they occupied this property and lived in this community. But, be that as it may, giving to their testimony every inference of which it is reasonably susceptible, it amounts to nothing upon either quality or value, save the bald declaration that appellees "did not discover." Just as such a declaration in their pleading was manifestly insufficient to state a cause of action, so such

declarations in their testimony are equally insufficient to maintain it. The motion for directed verdict should have been granted.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF APPELLANT'S KNOWLEDGE OF THE FALSITY OF THE ALLEGED REPRESENTATIONS.

The Court's charge in respect of the foregoing is found on pages 32 and 33 of the transcript. Of course, the Court was concerned with the application of the representations to the particular ten acre tract purchased by appellees. With regard to the representations contained in the booklet which appellees claimed they read and relied on, being Plaintiffs' Exhibit 1, the Court stated that in respect of appellees' lot the book declared it to have been "positively proven beyond doubt" that the land was well adapted to the growing of deciduous fruits commercially. Said the Court:

> "There is nothing stronger than that, gentlemen of the jury * * * that is a very positive assertion in kind to impress * * * so when the defendant says it is positively proven it is bound to know the condition of the land. If that representation is false, that the land was well adapted to commercial orcharding, the law imputes to them the knowledge and they are liable accordingly."

Herein, of course, the Court took from the jury the question of whether or not in respect of the ten acre tract purchased by appellees, appellant knew the falsity of that statement. The statement quoted by the Court, inaccurately, it is true, was taken from a letter published in the booklet and signed by one

Brosius, horticultural commissioner of Sacramento County. It refers to the Rio Linda section as the subject of the statements therein made. The letter appears on page 6 of the exhibit. It makes no statement concerning any parcel of ground, and its statements are general, and not particular. It states that "the splendid growth and the excessive yield obtained during the past five or six years has proven beyond a doubt that this district is well adapted for the commercial growing of almonds", etc. Bearing in mind that the Rio Linda section referred to in the letter comprises 12,000 acres of land, it is apparent that the general statements therein made cannot be fairly said to be representations that each and every ten acre parcel in the entire district has been proven beyond a doubt to be well adapted to commercial orcharding. This is especially true when we consider that in other places the reader of that booklet is informed that the conditions in the district do vary. Thus we find, on page 7, the reader informed that the top soil is variable in depth and not adapted to all of the different fruit trees and vines, but variously adapted thereto; that it is underlain by a subsoil denominated hardpan, which varies in depth, texture and character.

It is impossible for a subdivider of a district as large as this to issue literature, however honestly descriptive it may be, which can apply to each and every parcel of ground referred to, and it is absolutely unfair to subject such general statements to any such unreasonable test. That is exactly what the Court did, not even submitting to the jury the question of whether or not the representation was made in

respect of appellees' ten acre lot, and therein we submit the Court erred.

THE COURT ERRED IN INSTRUCTING THE JURY UPON THE DEFINITION OF A "COMMERCIAL ORCHARD."

The Court instructed the jury (Transcript, p. 123):

> "A commercial orchard may be taken to be one that with reasonable care and labor will produce such reasonable crops for such period of time that, at reasonable markets, the whole enterprise throughout its career, will have returned a profit."

We submit it was error for the Court to define the meaning of the term "commercial orchard" as it did. Because of the general language used with regard to care and labor, amount of crop obtained and market price, the only definite thing about this instruction is that an orchard must return a profit. To talk to the jury of reasonable care and labor, reasonable crops, reasonable markets, is to tell them nothing. But the question of profit was prominently placed before them.

The instruction ignores the very vital requirement that the size of the orchard must be taken into consideration, for it is perfectly obvious that however well adapted soil may be to the growth of fruit trees, a profit, granted all the other requirements will or will not be made, depending exactly upon the size of the parcel of land devoted to that purpose. No man can, we submit, go into commercial orcharding on so small a parcel of property as would have been in the possession of these appellees, over and above those

parts of their ten acre tract necessarily occupied by their buildings and their poultry industry, which they admit they intended to go into when they came here, and did enter upon.

Bearing in mind that the definition of commercial orchard, as given by the Court, has application only to the amount of land which the appellees would have available for that purpose, it is apparent that the definition ignored what should have been the most vital part thereof.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF THE PRESENT ADAPTABILITY OF THE SOIL TO THE RAISING OF FRUIT.

The instruction of the Court in respect of this matter appears on pages 35 and 36 of the transcript. Therein the Court told the jury that the representation made concerning this parcel of land to the appellees by appellant was that it was in its present condition well adapted to commercial orcharding, and that this representation would not be borne out by proof that it would be well adapted if the hardpan were blasted in preparing the soil for that use. In short, that if such proof were believed, it would amount to proof of falsity of the representations. As the Court said: "The representation was that the land is, not that the land can be, adapted by further exertions in the way of blasting."

We submit this was unfair and erroneous. Blasting of lands to be planted to orchard trees is an ordinary and usual method of preparing the soil for that purpose. To tell the jury as a matter of fact that land

which required in the course of good husbandry that such preparation be given it was not adapted by reason of that fact to commercial orcharding was to err doubly: First, in asserting that which was not true; and second, in taking that question from the jury as a matter of fact, and giving it to them as a matter of law, that such preparation was not ordinary or usual.

In this regard it is interesting to compare the Court's ideas in this regard to the ideas held by it in the matter of excusing appellees' failure to discover the falsity of their representations. Hansen had testified that when he came to California he discovered eighteen feet of hardpan eighteen inches beneath the surface of his soil, and was told that he would have to blast in preparing his land for fruit culture. (Transcript, page 48.) In the last portion of his charge (Transcript, pages 133 and 134), the Court was concerned with the matter of telling the jury what might excuse appellees' failure to discover fraud, and, touching upon this matter of hardpan and the blasting thereof, says that Mr. McNaughton, the agent of appellant, quieted the suspicions of appellees which arose when they discovered the hardpan, by telling them that "if you blasted the roots will penetrate and water and air will slack that hardpan."

The Court continued:

> "So he goes to the Company's expert, and the Company's expert quiets his suspicion, if he had any."

Just how the Company's expert could quiet the suspicions of a man by furnishing him with proof that

he had been defrauded is difficult indeed to understand. The position of the Court upon this matter is by the foregoing demonstrated to be utterly inconsistent.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF THE TIME OF THE DISCOVERY OF THE ALLEGED FRAUD WITH REGARD TO THE STATUTE OF LIMITATIONS.

The instruction of the Court upon the question of discovery appears on pages 36, 37, 38 and 39 of the transcript. We submit that the instruction is contrary to law, and that it failed to properly tell the jury what was required of appellees in establishing, as they were required to, that they had used due diligence to detect the fraud after moving upon the property, and were unable thereby to do so. The Court, throughout its charge, treats this matter as one wherein nothing in the way of diligence was required of these appellees, and charges them only with the duty of diligence after they had discovered fraud or facts sufficient to put them upon notice. Thus the Court says that:

> "They must bring their suit within three years after they discover the fact that they have been defrauded or within three years after they discovered facts which ought in the judgment of the jury to have put them on notice, and which, had they pursued the inquiry with diligence, would have made them acquainted with the proof that they had been defrauded."

The rest of the Court's charge upon this matter is concerned with the matter of what the appellees were not required to do, and not at all with what action

was required of them in the matter of diligence to detect the fraud.

Thus the Court says that because experts differ as to the effect of hardpan in the soil, appellees were excused after discovery of the hardpan from coming to any conclusion about the matter.

We would be perfectly willing to accept such a classification of the representation concerning this matter if the Court had made it consistent throughout and had told the jury as to the representation what it told it with regard to the investigation, that is, that it was a matter of dispute and opinion, to be settled among experts. But the Court found no difficulty in declaring that it was not a matter of opinion whatsoever, but a positive misrepresentation of a material fact, susceptible of knowledge, and that such a representation had in fact been made. We respectfully submit that whatever may have been the sympathy of the Court in this matter, it should not have blown both hot and cold in respect of such vital matters.

Concerning the matter of appellees' discovery that Amblad's representations concerning hardpan were false, and the action of appellees on discovering them to have been false in going to a companion employee of the appellant, the Court seems to have found nothing inconsistent with due diligence in that regard but rather to have considered it the proper and reasonable thing to do, and it tells the jury about that matter and, with regard to appellees' reliance upon what the second agent had told him, in contradiction to what the first had said, says:

> "Again he says he believed it. When you ask yourselves whether he did believe it, ask yourselves why he shouldn't believe it. He still had confidence in the fairness of the Company." (Transcript, page 38.)

In telling the jury that the appellees still had confidence in the fairness of the Company, the Court was not commenting upon evidence, but giving to the jury his conclusions about a matter which should have been left to them. The Court was arguing to the jury that appellees had a perfect right to remain quiescent after that occurrence.

The Court continued (page 38 of Transcript):

> "So he goes to the Company's expert, and the Company's expert quiets his suspicions, if he had and. gives him reassurance that it was all true, that this hardpan was valuable and necessary to contribute to the growth and the productiveness of the trees. He says he believed it. He made no further inquiry, he says. You ask yourselves whether a person in his position ought to listen to any rumor that might pass around, if there was any. He says he heard none. He heard nothing derogatory to the land until after the time that his suit would be in time, February, 1925—in 1925 he proceeded to plant trees. The first year he says they did well. That carried him over the time, Gentlemen of the Jury, when his suit could be in time— He was only required to make inquiry when his suspicions were aroused."

In short, throughout this charge, the Court nowhere tells the jury that it was incumbent upon appellees, if they wished to hold appellant in fraud, to exercise due diligence to detect the existence of fraud when the disability under which they labored in making their bargain was removed. On the contrary, the

Court seeks to excuse them by copiously commenting upon matters such as we have hereinbefore pointed out. We submit the Court herein fell into error.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE QUESTION OF THE STATUTE OF LIMITATIONS, AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTION NO I.

This instruction requested by appellant appears on pages 40, 41 and 42 of the transcript. We will not repeat it here *in extenso,* but will summarize it by stating that its main purpose was to inform the jury what the Court in its charge signally failed to tell them about, viz., that appellees must prove by a preponderance of the evidence that they have used reasonable diligence to detect the fraud they complain of, and could not by that means do so until a period within three years of the time of filing their suit; that "they were not permitted to remain inactive after the transaction was completed, but it was their duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to them"; that "they were not excused from the making of such discovery, even if the defendant in such action remains silent"; that "they must show by a preponderance of the evidence not only that they were ignorant of the fraud, up to a date within three years of the commencement of their action, but also that they had used due diligence to detect the fraud after it occurred and could not do so"; that the jury "must believe from a preponderance of the evidence that

they (appellees) neither knew of the fraud nor could with reasonable diligence have discovered the fraud before a date three years prior to the commencement of their action." All of the authorities and arguments hereinbefore quoted and made concerning this matter of the statute of limitations are applicable here. The requested instruction correctly stated the law, pointed out an element, to wit, the necessity for the use of diligence, which the Court in its charge not only omitted, but sought to excuse, and the refusal to give it was error. The refusal to give it was duly excepted to. (Transcript, page 137.)

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THE EFFECT OF THE DISCOVERY BY APPELLEES OF THE FALSITY OF THE MATERIAL REPRESENTATIONS AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTION NO. II.

Appellant requested the Court to instruct the jury that: "Upon the matter of plaintiff's discovery of the alleged fraud, if plaintiffs discovered that a material representation concerning the land they bought was false, then they were at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring their action within three years of the discovery of the falsity of any material representation concerning the land."

We have hereinbefore pointed out that in the Court's discussion of this matter of discovery, although it referred extensively to the matter of dis-

covering the falsity of the representations concerning the adaptability of the soil to fruit culture, it signally failed to comment upon the matter of the discovery of the representation as to value, which, as heretofore pointed out, exceeded the other representations in importance and in the damage consequent thereon, if, in fact, it was false. The requested instruction stated the law as we have hereinbefore found it in the authorities cited in this brief pointed out. Indeed, it is elemental that a party who has been defrauded by the making of various false statements concerning the property he purchased is charged upon discovery of the falsity of one material representation with all that diligent inquiry concerning the truth of other representations would disclose, and further, that the statute of limitations begins running upon his cause of action, for he then knows he has been defrauded, and knows all that he need prove in his suit based upon the deceit, for as the Court told the jury in this case, it is not necessary for a person complaining of fraud to prove the falsity of all representations made, and it is enough if he proves that a single material representation was untrue.

Appellees herein were relying upon the misrepresentations of value, as well as upon those of quality. The Court instructed the jury that it was a material representation, a matter of fact and not of opinion. Accepting that as the truth, and remembering that its falsity was much more easily discoverable than was the falsity of the other representations complained of, it is singular, indeed, that the Court, in all the space consumed in excusing appellees for non-discovery of

the quality representations, omitted all mention of that concerning value. True, it would be difficult indeed to formulate an excuse in the latter matter, for as we have hereinbefore said, it is utterly impossible that there could be facts or circumstances justifying a failure to discover the truth of such a matter. Appellees could think of none in their testimony, except to say that they 'had not been told by anyone, and had made inquiries of no one about the matter." Certainly appellant was entitled to have the jury instructed upon this most important matter, and we submit the Court erred in refusing to so instruct them.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THE EFFECT OF APPELLEES' HAVING BEEN ABLE BY REASONABLE DILIGENCE TO DISCOVER THE FALSITY OF THE ALLEGED REPRESENTATIONS AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTION NO. 5.

Appellant requested the Court to instruct the jury as follows:

> "You are instructed that if the plaintiffs discovered or by the exercise of reasonable diligence could have discovered the falsity of the alleged representations as to value of the land they bought more than three years before they commenced their action, then your verdict must be for the defendant."

What we have heretofore said concerning the refusal to give appellant's Instruction No. II next hereinabove discussed is equally applicable here. By this proposed instruction the Court had pointed out to it specifically the desire of appellant that upon this

most important question of value and the duty of the appellees to exercise diligence in the matter of its discovery, the jury should be clearly instructed. We will not repeat what we have heretofore said about this matter, but submit it upon the arguments hereinbefore advanced. It proves clearly that appellant was seeking to have these matters properly presented to the jury, and that the Court was steadily refusing to do it.

We request that the judgment be reversed.

Respectfully submitted,

BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Appellant.

No. 5705

IN THE

United States Circuit Court of Appeals

For the Ninth District

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a corporation,

Appellant,

vs.

J. H. HANSON and JENNIE B. HANSON,

Appellees.

BRIEF OF APPELLEES

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TABLE OF AUTHORITIES CITED

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No. 5705

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Appellees.

BRIEF OF APPELLEES.

STATEMENT OF FACTS

This case is in its particulars essentially similar to that of Melin, No. 5671. The represented value of the land was $275.00 per acre. Plaintiff made the purchase in November, 1921, and moved onto the land in November, 1922. Shortly thereafter he dug a well pit and struck what he later found out to be hardpan. He went to defendant's horticulturalist and asked about the effect of hardpan upon fruit raising and was advised by him that it was only a volcanic ash and was good for trees. He did, however, advise that some blasting should be done. Plaintiff had invested all of his money in the land and was not able to go into the fruit business until the spring of 1925. He commenced his action in May, 1928, approximately three years after the trees had been planted.

ARGUMENT

I.

THERE WAS NO ERROR IN OVERRULING THE DEMURRER.

We have considered in the Melin case, No. 5671, the points raised by the apellant on demurrer. The complaint in the case at bar is not subject to their criticisms for the further reason that by an amendment thereto plaintiff explained his failure to make discovery sooner. The most important portion of this explanation is that all of his neighbors were living upon lands purchased from the same company by reason of similar representations and were all as ignorant of the facts as were the plaintiffs. More over, no exception was taken to the order overruling the demurrer, hence any error is waived.

German A. I. Co. vs. *Hale,* 219 U. S. 307; 31 Sup. Ct. 246; 55 L. Ed. 29.

II.

THERE WAS NO ERROR IN THE RULING UPON THE QUESTION ASKED THE WITNESS DAVIS.

The incident appears at page 55 of the transcript. The question was as follows: "Can you in some way give us an idea of the extent of your failure over the seven years of your operation?" This was objected to as immaterial and of no foundation. There was absolutely nothing in the question to indicate in what manner the witness would attempt to show the extent of failure in attempting to raise fruit on 150 acres of land similar to that sold to plaintiffs. Appellant did not consider the

matter serious at the time, because no motion was made to strike out the answer nor was any request made of the trial court to have the jury disregard the evidence.

We think the evidence thus elicited was quite proper. By the opening statement the issues had been boiled down to the representation that plaintiffs' land was represented to be well adapted to commercial orcharding and worth $275.00 per acre. The test of any commercial enterprise is the profit or loss sustained by engaging in it over a period of years. The witness Davis had attempted to raise fruit for seven years, and the amount of his profits or losses was of decided importance as showing whether such lands were adapted to the commercial production of fruit. The rule in such matters is set out in the following authorities:

Syllabus. "The admission of evidence which proved irrelevant to the issues finally submitted, and may have been prejudicial to the adverse party, is not ordinarily ground for reversal of a judgment, unless the attention of the court was called to it, and some action asked for to correct its effect."

Southern R. R. Co. vs. *Rogers*, 196 Fed. 286.

"Where the question relates to the tendency of certain testimony to throw light upon a particular fact * * * * there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.

Moore vs. *U. S.*, 14 Sup. Ct. 26; 150 U. S. 57.

"Where the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on grounds of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other."

Castle vs. *Bullard,* 64 U. S. 172; 16 Sup. Ct. 424.

Complaint is made as to the instruction. It was not excepted to nor was any assignment of error based thereon.

III.

THERE WAS NO ERROR IN THE RULING ON APPELLANT'S MOTION FOR A DIRECTED VERDICT.

It will be noted (Trans. 110) that the motion for a directed verdict was not made immediately upon the close of the evidence but was deferred until after the cause had been argued to the jury. It has been held that putting on of evidence after making such a motion is a waiver thereof, and it would seem that the same reasoning might apply to this case. In the course of the argument, counsel for appellant made certain admissions which appear at page 139 and 140 of the transcript. Briefly, these were that the defendant by its literature represented that the particular piece of land purchased by plaintiffs was proven beyond a doubt to be well adapted to the raising of fruit commercially and that the representation had been made for the purpose of inducing plaintiffs to buy the land. There were other admissions in the course of the argument

which have not been included in the bill of exceptions. Taken together, they serve to change the contentions of the parties somewhat, and it would be unfair to consider the court's ruling upon the motion without taking into consideration all of the admissions made in the course of the argument. The authorities on waiver of a motion of this sort are set out in our brief in the case of Melin, to which reference is made.

Reference to the same brief is also made for a general discussion of the principles relative to the statute of limitation, the only point urged in support of the motion.

The only new argument advanced in this case is that sometime in 1922 or 1923 McNaughton, the appellant's horticultural adviser, told the plaintiffs that the substance in their land was volcanic ash and was beneficial to trees. This is claimed to be in conflict with the statements of the salesman Amblad. The conflict is more apparent than real and simply consists of the application of two different terms to the same substance. Plaintiff is taken to task for going to McNaughton and accepting his information. The pamphlet on which the land was sold to him represented at page 21 that appellant had a competent horticultural adviser, naming this gentleman. A letter from him was published along with his photograph. The letter contained the following statement: "We sometimes advise blasting to shatter this sub-soil, securing better drainage and more freedom for tree roots. As these conditions vary somewhat, it becomes my duty and pleasure to advise * * * * what treatment each individual tract requires."

Under these circumstances, it cannot be said that the statement of McNaughton that blasting this piece was necessary would arouse suspicion in the breast of anyone.

The question of the value of this land and its adaptability to commercial orcharding was sufficiently close to warrant the joining of issues thereon in this trial and those of the other thirty-seven cases. Appellant was able to produce numerous witnesses to support its contention that it had sold plaintiffs good orchard land worth $275.00 per acre. It can hardly be said that these were matters of such common knowledge that plaintiffs must be held to have known the truth concerning them. Both representations were as to matters in which expert opinion was required and upon which experts could, and did, differ.

IV.

THERE WAS NO ERROR IN THE INSTRUCTION ON THE QUESTION OF APPELLANT'S KNOWLEDGE OF THE FALSITY OF THE REPRESENTATIONS.

The complaint is that the court took from the jury the question as to whether appellant knew the falsity of its published statement. This brings us to the question of the form of the representation made. As to this, there can be no question in view of the admission of counsel. (Trans. p. 139-140, already referred to.) Since it is admitted that the representations were positively made, appellant will not be heard to say that it did not know that they were false.

Smith vs. *Richards,* 13 Peters 26; 10 L. Ed. 42.

V.

THERE WAS NO ERROR IN THE DEFINITION OF A "COMMERCIAL ORCHARD."

The criticism of the instruction is first that general language was used. All of the instructions offered by appellant, and none was offered on this point, are subject to the same criticism. Reasonable care and reasonable actions are submitted to the jury in every action for negligence. Since in those cases they are able to determine what is reasonable, it is difficult to understand why they should not understand the meaning of the term when applied to orcharding.

The second criticism attempts to argue that commercial orcharding is not possible upon a ten-acre tract. In this appellant goes in the face of the argument made in all of its pamphlets to the various purchasers. The lands were divided into ten-acre tracts which, says the book, "properly planted to orchard and garden will be all that one man can handle and get the best results." It proceeds to say that they recommend a planting of a small family orchard and one or two kinds of trees on the balance of the tract for commercial purposes. Appellant is estopped to claim that ten-acre tracts are not of sufficient size for a commercial orchard.

VI.

THERE WAS NO ERROR IN THE INSTRUCTIONS CONCERNING THE ADAPTABILITY OF THE SOIL TO RAISING FRUIT.

Under this head appellant seeks to urge that there was some inconsistency in the court's instructions with

reference to blasting. The situation is that the casual reference thereto tucked away in the letter of McNaughton did not call attention to the large amount of blasting that would be required under any theory of the case. Plaintiffs' position was that the land could not be adapted to fruit raising by any reasonable amount of blasting, and defendant contended that the land might be made over into fruit land by this operation. The court's comment upon the subject, contained in the portion of the instructions attacked, was simply a comment upon the evidence and not an instruction as to the law. It was explaining to the jury that the various experts were not wholly in conflict with each other in that one said five feet of soil was necessary and the other group said that the depth could be secured artificially by blasting. The court had advised the jury (Trans. 115) that they were the sole judges of the facts, and any mistake in quoting them or commenting upon them is not available to appellant.

D. & H. Co. vs. *Nahas,* 14 Fed. (2d) 56.

It might be remarked, further, that the statement of McNaughton, which lulled the plaintiffs into security, did not advise them that blasting was an expensive operation. His casual reference thereto in the conversation and, also, in the portion of the letter already quoted was not such as to indicate an operation which might cost as much as $75.00 per acre. If the blasting cost only $10.00 to $15.00 per acre, it might well be so small a cost as not to have any influence upon the plaintiffs.

VII.

THERE WAS NO ERROR IN THE INSTRUCTIONS AS TO THE TIME OF THE DISCOVERY OF THE FRAUD NOR IN THE FAILURE TO GIVE APPELLANT'S PROPOSED INSTRUCTIONS NUMBER I, II and V.

All of the instructions above referred to have to do with the statute of limitations. Numbers I and V, as has been pointed out in other briefs herein, are both erroneous in that they attempt to cast upon plaintiffs the burden of investigating to see if they have been defrauded in the absence of any fact or circumstance putting them upon inquiry.

McMahon vs. *Grimes,* 77 C. D. 356; 275 Pac. 440.

Instructions No. II stated that if plaintiffs discovered a material representation to be false they were at once presumed to have knowledge of the falsity of the other represntations. There was not a scintilla of evidence in this case to show that plaintiffs had made any discovery of the falsity of any representation, so that the instruction was not proper under the evidence of the case.

But the instruction was incorrect for several reasons. It stated that there was a presumption where at most there is a disputable inference. It did not allow them any reasonable time in which to make inquiry and, further, it did not limit the misrepresentation discovered to one relating to the ultimate knowledge in question. It was incorrect for all of these reasons.

The first two objections mentioned are disclosed from an examination of the authorities cited by appellants

for this instruction, and the third is found in

Zeller vs. *Milligan*, 71 Cal. App. 617.

The instructions actually given by the court upon these subjects are found at page 132 to 136 of the transcript. Taken in their entirety, they are a full and correct statement of the law upon the propositions involved.

VIII.

THE EXCEPTIONS TAKEN IN THE TRIAL COURT TO THE INSTRUCTIONS WERE ENTIRELY INSUFFICIENT.

The exceptions taken fall naturally into three groups. All are set out at pages 136 to 138 of the transcript. The first group are all general and relate to the instructions given by the court. In no one of them is any effort made to assist the court to correct its supposed error nor do these refer with such particularity to the portion complained of that it can be identified. Appellant has set out in its specifications of error long excerpts from the instructions given. In hardly any instance has it cited all that the court said upon the given subject. Most of the instructions covered several propositions of law, at least one of which is not even attacked. None of these exceptions is sufficient.

Killisnoo Packing Co. vs. *Scott*, 14 Fed. (2d) 86.
Jones vs. *U. S.*, 265 Fed. 235.

The next group are exceptions to the refusal of the court to give instructions proposed by appellant. These are subjects to the same objection. They only refer to the proposed instructions by numbers and give a brief reference to the subject-matter of the instruction

proposed. In no instance do they call attention of the court to the particular portion thereof which is claimed to have been omitted and in every case they fail to state the law correctly when it is considered with reference to the facts of the instant case. They, likewise, are insufficient.

Alaska Steamship Co. vs. *Katzeek,* 16 Fed (2d) 210.

By the last two exceptions, appellant attempted to challenge the court's instruction that the booklet represented plaintiffs' land to be adapted to the growing of deciduous fruit commercially. As we have already pointed out in this brief, in the course of the argument appellant admitted not only that the representations referred to this particular piece of land but, further, admitted that it had represented that the land was proven beyond a doubt to be well adapted to the raising of fruit commercially. How appellant could be injured by the court's stating what its counsel had already admitted to the jury is difficult to understand. Indeed, we do not understand it.

CONCLUSION

We can find nothing in this case to single it out and distinguish it from the cases which went before. The assignments of error are slightly different. Most of them are hypertechnical. The matters complained of are not likely to have influenced the jury, who were familiar with lands of the type involved and under the facts could have come to no other conclusion. The exceptions noted to the instructions are all insufficient to bring the matter before an appellate court. There are

additional specifications of error, but we have not attempted to reply to any of those on which no argument was advanced.

Respectfully submitted,

RALPH H. LEWIS
GEORGE E. McCUTCHEN
Attorneys for Appellees.

No. 5706

United States

Circuit Court of Appeals

For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

N. H. NEPSTAD,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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In the Northern Division of the District Court of the United States, in and for the Northern District of California.

N. H. NEPSTAD,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Defendant.

COMPLAINT.

Plaintiff complaining alleges:

I.

That defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That plaintiffs are citizens and residents of the State of California; that defendant is a resident of the State of Minnesota; and the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

That on and prior to the month of March, 1922, plaintiff was residing at Minot, North Dakota, was wholly unfamiliar with California farm and fruit lands, the nature, qualities and values thereof and in the negotiations hereinafter referred to was compelled to rely, and did rely, entirely upon the statements and representations of defendant with respect thereto.

IV.

That defendant well knew of the unfamiliarity of plaintiff with each of the matters and things contained in the representations hereinafter set forth and with intent to cheat and defraud plaintiff by inducing him to enter into the contracts hereinafter referred to falsely and fraudulently stated [1*] and represented to plaintiff that all of the tracts of land in the county of Sacramento, State of California, and particularly that each of the tracts hereinafter referred to was of the fair and reasonable market value of $350.00 per acre and upwards; that each acre thereof was of the fair and reasonable value of $350.00 per acre and upwards; that all of the land thereof was rich and

*Page-number appearing at the foot of page of original certified Transcript of Record.

fertile and was capable of producing all sorts of farm crops and products; and all of said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that all of said land was perfectly adapted to the raising of all kinds of deciduous fruits in commercial quantities; that all of said land was capable of producing large crops of any kind of deciduous fruits planted thereon; and that said crops were of the finest quality.

V.

That at the instance of defendant, plaintiff made a visit to California about the month of May, 1922, for the purpose of viewing said lands and on the occasion of said visit was met by defendant and shown over said lands casually and for a very short period of time and was also taken upon thriving and productive orchard lands in the Fair Oaks district and in the Carmichael Colony in the County of Sacramento, State of California. That defendant then and there stated to plaintiff that all of the lands being sold by defendant were similar in quality, soil conditions and productivity to the lands of said thriving and productive farms. That all of said investigation was conducted under the strict supervision and guidance of defendant and plaintiff made no other investigation thereof and relied solely upon the statements and representations of defendant in each of the matters and things hereinafter set forth.

VI.

That plaintiff was then the owner of a certain

promissory note executed by T. T. Ethun for $823.00, and said sum was [2] the reasonable value of said note. That plaintiff was also the owner of that certain real property in Minot, N. D., known as 1016 Second St. N. E., and more particularly described as Lot 9, Block 5, Lake View Addition to the City of Minot, N. D., and said real property was unincumbered and was of the fair and reasonable value of $6,500 and upwards.

VII.

That plaintiff relied upon said representations, and each of them, and believed them to be true and solely by reason of his reliance thereon on or about the 24th day of March, 1922, executed a certain contract whereby he agreed to purchase from defendant at a price of $14,000.00 that certain real property in the County of Sacramento, State of California, described as Lots No. 101, 102, 107 and 108 in Rio Linda Subdivision No. 6, containing 40 acres; to transfer said note and said real property to defendant and receive credit thereon in the sum of $7,323.00.

VIII.

That thereafter and on or about the 12th day of September, 1922, defendant requested plaintiff to enter into a modification of said contract. That plaintiff had made no further investigation of said property and had acquired no additional information concerning the same and still relied upon the statements and representations of defendant hereinafter set forth. That solely by reason thereof plaintiff thereupon entered into another contract with de-

fendant, which contract bore the date of March 24, 1922, but was really executed on or about the 20th day of September, 1922, and thereby agreed to purchase, for a sum of $14,000.00 that certain real property described as Lots No. 93, 94, 102 and 107 of Rio Linda Subdivision No. 6 as per the official map filed in the office of the Recorder of the County of Sacramento, State of California, containing 40 acres, and defendant in consideration [3] of the previous transfer of said note and of said real property in Minot, N. D., acknowledged receipt of a payment on said contract of $7,523.00.

IX.

That plaintiff well and faithfully did and performed all the terms, covenants and conditions of said contract on his part to be performed and well and faithfully paid all of said balance to defendant prior to the 2d day of February, 1926, and thereupon received from defendant a deed to said land described real property.

X.

That said representations were, and each of them was, at the time of the making thereof, false and untrue and were known to defendant to be false and untrue. That it was not then, there or at all true that any of said real property in Sacramento County then being sold by defendant was of the fair or reasonable market value of in excess of $50.00 per acre and/or that any of said land was fertile or would produce any crops in commercial quantities and/or was at all adapted to the growing

of fruits or fruit-trees and/or was capable of producing any merchantable fruits and/or that any of said land was similar to the other lands so shown to plaintiff. That, on the contrary, said land was poor and unfertile, was underlaid with hard-pan and clay and was not at all adapted to the growing of fruit-trees or any farm crops or products.

XI.

That by reason of the false and fraudulent representations of defendant, as aforesaid, and by reason of his entering into said contracts with defendant, as aforesaid, plaintiff has been damaged in the sum of $12,000.00.

XII.

That the said acts of defendant and defendant's whole course of conduct were unlawful, malicious, fraudulent and oppressive and a reasonable sum to be allowed plaintiff as punitive damages therefor is $5,000.00. [4]

WHEREFORE, plaintiff prays judgment for $17,000.00, interest thereon at the rate of 7% per annum from the 24th day of March, 1922, costs of suit and general relief.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiff. [5]

State of California,
County of Sacramento,—ss.

N. H. Nepstad, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled matter and that he has read the foregoing

complaint and knows the same to be true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

N. H. NEPSTAD.

Subscribed and sworn to before me this 28th day of February, 1928.

[Seal] GEORGE E. McCUTCHEN,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Feb. 29, 1928. [6]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes defendant above named and demurs to the complaint of plaintiff on file herein, and for grounds of demurrer alleges as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this, that it cannot be ascertained therefrom why plaintiff was compelled to rely upon the statements and representations of the defendant with respect to the property referred to in plaintiff's complaint.

III.

That said complaint is further uncertain in this,

that it cannot be ascertained therefrom whether or not plaintiff, prior to entering into said contract, knew or was informed that the lands alleged to have been purchased from defendant were underlain with hard-pan and clay.

IV.

That said complaint is further uncertain in this, that it cannot be ascertained therefrom what quantities of fruit are [7] "commercial quantities," or what is meant by the term "commercial quantities" as used in plaintiff's complaint, or what is meant by the term "merchantable fruits" as used therein, or in what way or in what particulars said lands purchased by plaintiff were not similar to the other land alleged to have been shown to plaintiff.

V.

That said complaint is further uncertain in this, that it cannot be ascertained therefrom what is meant by the terms "rich and fertile" as used in plaintiff's complaint with relation to the quality of the soil alleged to have been purchased by plaintiff, or what is meant by the terms "conditions and things injurious or harmful to the growth of fruit-trees," or what defects in said soil rendered it unadapted to the growing of fruits or fruit-trees, or why said soil was not adapted to the growing of fruit-trees or adapted to the growing of farm crops or products.

VI.

That said complaint is ambiguous and unintelli-

gible for each of the reasons hereinabove given for its being uncertain.

VII.

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof of the Code of Civil Procedure of the State of California.

WHEREFORE defendant prays that plaintiff take nothing by his action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 13th day of March, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Pltf.

[Endorsed]: Filed Mar. 13, 1928. [8]

[Title of Court and Cause.]

AMENDMENT TO COMPLAINT.

Comes now the plaintiff above named and pursuant to the annexed stipulation files this, his amendment to complaint herein:

XIII.

That plaintiff did not return to California until July, 1922, and did not move upon said land but took up his residence in the city of Sacramento.

That during the fall of 1922 plaintiff went to Canada on business and remained there until the winter of 1922 and then returned to his residence in the city of Sacramento. That thereafter plaintiff was again absent from said community and in Canada during the fall of 1923. That plaintiff has never lived on said land and during all the balance of said time has been employed as a carpenter in and about the city of Sacramento.

XIV.

That all of the lands adjoining the lands so sold by defendant to plaintiff were sold to persons formerly residing in the eastern part of the United States as fruit lands of great value, and said persons were unfamiliar with the values of California lands and with the adaptability of said tracts to the growing of fruit, and it was believed generally in the locality of said land up to February, 1927, that said lands were fruit lands and were of a value of approximately $350.00 per acre. [9]

XV.

That plaintiff retained said land as an investment and had no occasion to have the same appraised or to offer it for sale and did not hear from anyone that it was not of said value or was not rich and fertile fruit land prior to the spring of 1927.

XVI.

That in the spring of 1927 a number of said persons discovered that they had been defrauded in the purchase of adjoining lands and complained to the Real Estate Commissioner of the State of Cali-

fornia, and some sort of hearing of their charges was had before said Real Estate Commissioner. That said complaints were dismissed by said Commissioner for lack of jurisdiction and nothing further was done at that time. That plaintiff did not make any particular inquiry as to the outcome of said hearing but was subsequently advised by defendant that said complaints had been dismissed because there was no foundation in fact therefor, and defendant then represented to plaintiff that his land was worth the amount that he had paid for it and was rich and fertile fruit land. That because of the dismissal of said charges plaintiff believed said statements to be true and did not actually realize that he had been defrauded until sometime after the middle of the year 1927. That plaintiff's actual discovery thereof was brought about by a further discussion of the facts concerning said tracts of land with other settlers in said locality who had been so defrauded.

WHEREFORE, plaintiff prays judgment for $17,000.00, interest thereon at the rate of 7% per annum from the 24th day of March, 1922, costs of suit and general relief.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiff. [10]

It is hereby stipulated that the foregoing amendment to complaint may be filed in the above-entitled matter.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiff.
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Approved.

_____,
District Judge.

Service of copy admitted 4/24/28.
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 25, 1928. [11]

[Title of Court and Cause.]

DEMURRER TO AMENDED COMPLAINT.

Comes now defendant above named and demurs to plaintiff's complaint as amended, and for grounds of demurrer thereto, alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said action and cause of action is barred by the provisions of Section 338 and of Subdivision 4 thereof of the Code of Civil Procedure of the State of California.

III.

That said complaint is uncertain in this, that it cannot be ascertained therefrom why or for what reason plaintiff did not discover the alleged falsity of the representations made to him concerning said land prior to three years before the commencement of his action herein; and in this, that it cannot be ascertained therefrom how, why, or for what reason plaintiff did not discover what was the fair and reasonable value of said land so purchased by him more than three years prior to the commencement of his action herein; and in this, that it cannot be ascertained therefrom why or for what reason plaintiff did not discover that said land was not adapted to raising fruit in [12] commercial quantities, more than three years prior to the commencement of his action herein.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 10th day of May, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Pltf.

[Endorsed]: Filed May 10, 1928. [13]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city of Sacramento, on Monday the 11th day of June, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 11, 1928—ORDER OVERRULING DEMURRER.

The demurrer to complaint and the demurrer to the amended complaint came on regularly this day for hearing, and after argument by the counsel for the respective parties IT IS ORDERED that the demurrers be and the same are hereby overruled, with 20 days to answer. [14]

[Title of Court and Cause.]

ANSWER.

Now comes defendant above named, and answering plaintiff's complaint, admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in Paragraphs I and II of plaintiff's complaint.

II.

Admits that on and prior to March, 1922, plaintiff was residing at Minot, North Dakota.

III.

Admits that plaintiff made a visit to California about the month of May, 1922, for the purpose of viewing the lands referred to in his complaint, and on the occasion of said visit was shown over said lands by defendant.

IV.

Admits the allegations contained in Paragraph VI of plaintiff's complaint.

V.

Admits that on the 24th day of March, 1922, plaintiff executed a contract whereby he agreed to purchase of and from defendant, at a price of $14,000.00, certain real property described in Paragraph VII of his complaint, and agreed to transfer the promissory note and real property referred to in Paragraph VI [15] of his complaint to the defendant, upon receiving a credit upon the purchase price of said land, in the sum of $7,323.00.

VI.

Denies that on the 12th of September, 1922, or at any other time, defendant requested plaintiff to enter into a modification of said contract, but admits that said contract was at the request of plaintiff modified. Admits that said modified contract was executed on or about the 20th day of September, 1922, and that thereby plaintiff agreed to purchase for the sum of $14,000.00, the real prop-

erty described in Paragraph VIII of plaintiff's complaint, and that in consideration of the previous transfer of said note and real property to defendant, plaintiff received credit of the sum of $7,323.00, upon said contract, and that plaintiff at said time transferred an additional parcel of property in Minot to defendant, receiving a further credit of Two Hundred Dollars upon said second and modified contract.

VII.

Admits the allegations of Paragraph IX of plaintiff's complaint.

VIII.

Defendant denies each and all of the allegations of plaintiff's complaint not hereinabove denied for want of information or belief, or not hereinabove expressly admitted.

Further answering plaintiff's complaint, and as a further defense thereto, defendant alleges:

That this action and cause of action is barred under the provisions of Section 338 of the Code of Civil Procedure of the State of California, and of Subdivision 4 thereof.

WHEREFORE, defendant prays that plaintiff take nothing by his said action herein, and that defendant have and recover of and from the said plaintiff its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant. [16]

State of California,
County of Sacramento.

L. B. Schei, being duly sworn, deposes and says:

That he is an officer, to wit, the resident secretary of Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the within-entitled action; that he makes this affidavit for and on behalf of said corporation defendant; that he has read the foregoing and annexed answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to such matters he believes it to be true.

L. B. SCHEI.

Subscribed and sworn to before me this 27th day of August, 1928.

[Seal] J. W. S. BUTLER,
Notary Public in and for the County of Sacramento, State of California.

Service hereof is hereby admitted and receipt of copy acknowledged this 29th day of August, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Pltf.

[Endorsed]: Filed Aug. 29, 1928. [17]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city of Sacramento, on Thursday, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 18, 1928—TRIAL.

This case came on regularly this day for trial. Geo. E. McCutchen and Ralph Lewis, Esqs., appearing as attorneys for the plaintiff and J. W. S. Butler and E. P. Kelly, Esqs., appearing as attorneys for the defendant. Thereupon the following named persons, viz.:

C. D. Virgilio,	Joseph Devine,
Ralph W. Schenken,	W. A. Wilson,
Chas. Singer,	Joseph Dimock,
H. F. Denberry,	Joseph Z. Lock,
John E. Westoby,	Albert Greer, and
Henry W. Peterson,	Ted J. Gibson,

twelve good and lawful jurors, were, after being duly examined upon their oaths, sworn to try the issues joined herein. Counsel for both sides made their opening statements to the Court and jury.

N. H. Nepstad, P. F. Shirley, Howard D. Kerr, R. B. Loucks, H. L. Frederickson, Adolph Stern and Herbert C. Davis were sworn and testified on behalf of the plaintiff, and the plaintiff introduced in evidence and filed his exhibits marked Nos. 1, 2, 3, 4, 15, 16, 17 and 18, and the plaintiff rested. F. E. Unsworth, H. F. Bremer, Louie Terkelson, John Posehn, James Geddes, Lambert Hagel, E. E. Amblad, Arthur Morley and F. E. Twining were sworn and on behalf of the defendant and the defendant introduced in evidence and filed its exhibits marked Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, and the defendant rested. N. H. [18] Nepstad and Herbert C. Davis were recalled in rebuttal and E. Perra and John V. Kral were sworn and testified on behalf of the plaintiff in rebuttal, and the plaintiff again rested. J. W. S. Butler, Esq., made and filed a motion for a directed verdict, which motion was ORDERED denied. After argument by the counsels for the respective parties, it was ORDERED that the further trial hereof be continued to Friday, October 19, 1928, at 9:30 o'clock A. M., and the jury, after being duly admonished, were excused until that time. [19]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city of Sacramento, on Friday, the 19th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 19, 1928—TRIAL (RESUMED).

The parties hereto and the jury impaneled being present as heretofore the trial was thereupon resumed. After the instructions of the Court to the jury, the jury at 10:10 A. M. retired to deliberate upon their verdict. At 1:50 o'clock P. M. the jury returned into court for further instructions, and again retired at 1:55 o'clock P. M. for further deliberation. At 3:40 o'clock P. M. the jury returned into court and upon being asked if they had agreed upon a verdict, replied in the affirmative, which verdict was ORDERED recorded as follows, viz.:

"We, the jury, find in favor of the plaintiff and against the defendant, and assess the plaintiff's damages at $7,000.

Dated: October 19, 1928.

C. D. VIRGILIO,
Foreman."

and the jury being asked if said verdict is their verdict, each juror replied that it is. ORDERED judgment be entered herein in accordance with said verdict and for costs. ORDERED that juror Henry W. Peterson be excused until Tuesday, November 13th, 1928, at ten o'clock A. M., and the remaining eleven jurors be excused from further attendance upon this court. [20]

[Title of Court and Cause.]

VERDICT.

We, the jury, find in favor of the plaintiff and against the defendant, and assess the plaintiff's damages at $7,000.

C. D. VIRGILIO,
Foreman.

Dated: October 19, 1928.

[Endorsed]: Filed at 3:40 o'clock P. M., Oct. 19, 1928. [21]

In the Northern Division of the United States District Court for the Northern District of California.

No. 476.

N. H. NEPSTAD,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 18th day of October, 1928, being a day in the October, 1928, Term of said Northern Division of said court, before the court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, Geo. E. McCutchen and Ralph Lewis, Esqrs., appearing as attorneys for the plaintiff and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with on the 18th and 19th days of October, 1928, in said Term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury, the jury having subsequently rendered the following verdict, which was ORDERED recorded, to wit:

> "We, the jury, find in favor of the plaintiff and against the defendant, and assess the plaintiff's damages at $7,000.
>
> Dated: October 19, 1928.
>
> C. D. VIRGILIO,
> Foreman."

and the Court having ORDERED that judgment be entered in accordance with said verdict:

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,— [22]

IT IS ORDERED AND ADJUDGED that the plaintiff, N. H. Nepstad, do have and recover of

and from the defendant Sacramento Suburban Fruit Lands Company, a corporation, the sum of Seven Thousand ($7,000.00) Dollars, and for costs taxed at $38.15.

Judgment entered this 19th day of October, 1928.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [23]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, for the Northern District of California:

Now comes the defendant, Sacramento Suburban Fruit Lands Company, a corporation, by its attorneys, and respectfully shows:

That the defendant, feeling aggrieved by the verdict and judgment thereon in said cause rendered on the 19th day of October, 1928, in favor of plaintiff and against defendant, for the sum of Seven Thousand ($7,000.00) Dollars, damages, with costs amounting to Thirty-eight and 15/100 ($38.15) Dollars, hereby petitions the Court for an order allowing the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and that a citation be issued as provided by law, and that a transcript of the

record upon which said judgment was based be sent to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings in this court be suspended and stayed until the determination of the appeal, and that an order be made fixing the amount of surety which said defendant shall give upon this appeal.

Dated: November 28th, 1928.

J. W. S. BUTLER
(BUTLER, VAN DYKE & DESMOND),
EDWARD P. KELLY,
Attorneys for Defendant. [24]

Service hereof is hereby admitted and receipt of copy acknowledged this 28th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 30, 1928. [25]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the above-entitled cause, and makes and files the following assignment of errors, upon which it will rely in its prosecution of the appeal from the verdict and the judgment thereon, herein made and entered on the 19th day of October, 1928, in favor of the plaintiff, and against this defendant:

I.

The Court erred in overruling defendant's demurrer to the complaint filed in the above-entitled cause.

II.

The Court erred in sustaining an objection to the introduction in evidence of certain telegrams, as follows:

"Q. I show you a telegram dated June 15, 1922, signed by yourself. Did you send that telegram? A. I can't remember.

Q. I show you two telegrams, one dated June 12, 1922, signed by yourself, addressed to E. E. Amblad, and a reply dated June 15, 1922, addressed to you, and signed [26] by E. E. Amblad; did you send one and receive the other of those two telegrams?

A. Maybe I did, if it is here.

Mr. KELLY.—We offer in evidence the three telegrams as described above.

Mr. McCUTCHEN.—We object to them as immaterial, irrelevant, and incompetent, and they are not sufficiently proved. I don't understand the witness to say that he did; he says maybe he did.

The COURT.—He has not admitted them. Objection sustained.

Mr. KELLY.—Q. Mr. Nepstad, did you or did you not send and receive these telegrams?

A. Well, I can't remember for sure.

Q. Will you say you did not?

A. I won't say that, either, I don't remember.

Mr. KELLY.—We renew the offer.

Mr. McCUTCHEN.—The same objection.

The COURT.—Objection sustained."

III.

The Court erred in sustaining an objection to admission in evidence of a telegram from the plaintiff to E. E. Amblad, as follows:

"Q. Will you examine these other letters and documents? Those are all letters passing between you and the plaintiff, are they?

A. Yes, and one telegram received.

Q. This telegram of June 5 was received from Mr. Nepstad, was it? A. Yes. [27]

Mr. BUTLER.—We offer that.

Mr. McCUTCHEN.—We object to that telegram. Nepstad says he does not remember signing it. It is not proved that he signed it. We object to it as immaterial, irrelevant, and incompetent, and no foundation laid.

Mr. BUTLER.—Q. It was received from the telegraph company in due course of business, was it? A. Yes.

Mr. BUTLER.—We offer it.

The COURT.—I don't think the proof is sufficient, unless you have something else, for instance, unless you have an answer to it. Objection sustained.

Mr. BUTLER.—Exception."

IV.

The Court erred in sustaining an objection to the admission in evidence of a telegram from plaintiff to E. E. Amblad, as follows:

"Mr. BUTLER.—I offer this one of June 12.

Mr. McCUTCHEN.—The same objection.

The COURT.—Objection sustained.

Mr. BUTLER.—Exception."

V.

The Court erred in sustaining an objection to the introduction in evidence of a telegram from Mr. Amblad to the plaintiff, as follows:

"Mr. BUTLER.—I offer this one dated June 15, 1922, from Mr. Amblad to Mr. Nepstad.

Mr. McCUTCHEN.—The same objection.

The COURT.—Objection sustained.

Mr. BUTLER.—Exception." [28]

VI.

The Court erred in denying defendant's motion for an instructed verdict, as follows:

"Mr. BUTLER.—I desire to move at this time that the Court instruct the jury to render a verdict in favor of the defendant on the following grounds:

(1) That the evidence is insufficient to show that defendant deceived or defrauded plaintiffs in the making of the contract referred to in plaintiff's complaint for the purchase by plaintiff from defendant of land or either of said contracts.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character

of the land purchased by plaintiff from defendant, or the value thereof.

(3) That the evidence is insufficient to show that the plaintiff has been damaged by any act on the part of defendant.

(4) That the evidence shows affirmatively that plaintiff's cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof, of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiff's cause of action is not barred by said above-quoted provisions of said section of said Code.

The COURT.—The Court is of the opinion that the evidence is sufficient to go to the jury, and to sustain a verdict for the plaintiff, and that the suit is in time, providing the jury finds that the greater weight of the [29] evidence is with the plaintiff. Motion denied.

Mr. BUTLER.—Exception."

VII.

The Court erred in not holding that the evidence was insufficient to sustain plaintiff's cause of action.

VIII.

The Court erred in not holding that plaintiff's cause of action was barred by the statute of limitations.

IX.

The Court erred in instructing the jury on the question of the representations alleged to have been made by the defendant to the plaintiff, as follows:

"Coming now to the first representation, Was it represented to him that the land was adapted to commercial orcharding? In the first place, the defendant's advertising says so. Remember that the defendant, a corporation, speaks by the mouth of its agents, and by its advertising. The book is its agent, just as much as Mr. Amblad was its agent, who testified on the stand. So, if it represented that in its book, or through Mr. Amblad, the defendant is liable for it and is responsible for it. And, as counsel freely stated, they stand for it, provided it is proven. If any one of you sent out an agent to do business for you, you would be bound by his statements and by his representations, and if he falsifies you can be held to account for it, and to make it good if what he represented was within the scope of his employment. So we find in the book the advertising that came to the plaintiff before he purchased, that the land is represented as adapted to commercial orcharding. Indeed, the book goes [30] so far as to say in what is assumed to be a letter that it is proven beyond doubt to be adapted to the commercial raising of deciduous fruit—apples, pears, plums, apricots, and the like. Deciduous fruits are the tree fruits whereof the trees lose their leaves every year—cherries, peaches, and the like. The mere fact that it appears in the book in the form of a letter—and it appears in other places also, not in letters—does not relieve the defendant from responsibility. Whatever it prints in that book it says, no matter in what form it is, whether in the statement of a letter,

or assumed to be an endorsement by a number of citizens, or the like, the defendant is responsible. The plaintiff testifies that Amblad also told him that same thing,—that Amblad represented to him that this land was well adapted to commercial orcharding, for all kinds of fruit grown in California. He showed him pictures of orchards, and said the land was rich and fertile, you can plant grapes between the trees and the grapes will pay for the land before the trees come into bearing, and then you can grub the grape-vines out if you want to and rely on the orchard. That is what the plaintiff testified that Mr. Amblad told him. Mr. Amblad took the witness-stand, but he did not deny that. Mr. Amblad did not say anything about that.

So you see you have it in the book, you have it in the testimony of the plaintiff, that Mr. Amblad also said so, and there is no denial by Mr. Amblad, or of what is in the book, so that representation must be taken to be proven, Gentlemen of the Jury, and there cannot be any [31] other reasonable conclusion, in the light of the evidence.

Now, as to the representation that the land was $350 an acre. The book praises the land very highly. Of course, there is nothing wrong in that. Anyone has a right to praise his land; he has a right to fix any price on it he sees fit; but when he goes beyond that and says it is worth so much, its value is so much, when he says that to one who is not in an equally favorable situation to know the truth, then he becomes liable for it if it is false. The plaintiff testifies that Mr. Amblad did tell him

that the land was worth $350 an acre, and would be worth $400 an acre, the price would be raised soon. A mere prophecy as to the future would amount to nothing. Plaintiff said that Amblad told him the price was $350 an acre, and it was worth that. Now, again, Mr. Amblad, on the witness-stand, did not deny that. So, ask yourselves if there is any reason, considering that it was easy for the defendant to deny it if it had not been made, they had the witness here, and the plaintiff says that that representation was made, and he did not deny it. So you ask yourselves why shouldn't you accept the plaintiff's statement that that representation was made, and is so proven."

X.

The Court erred in instructing the jury on the question of the falsity of the alleged representations.

XI.

The Court erred in instructing the jury on the question of defendant's knowledge of the falsity of the alleged representations, as follows: [32]

"If either of those representations are thus made out by the greater weight of the evidence, you proceed to the next step, and that is, it must appear that these representations were false, and that the defendant knew they were false, or one of them, or should have known it, or made the assertions or the representations in a positive fashion in the face of which the Court will not hear it deny that it knew the truth. The defendant had been dealing

with these lands for some ten years at the time it sold to the plaintiff. I think its book says it sold its first tract out here in 1912. It had experts in its employ. Why was it it put it out to the world that this land was adapted to commercial orcharding, if it did not know whether it was or not? Would it not be at fault there? The law would say so. It was open to it to know. It had ten years to find it out, not only by experiments on the land in the neighborhood, but it had its experts to tell us what it was adapted to, and the nature and extent of the hard-pan, and what it would be likely to do to the growth of trees on a commercial orchard. It made the assertions positively. It states in its advertising book that it is proven beyond doubt; and when you say a thing is proven beyond doubt that implies a test, that it has been tested and demonstrated. If they make a positive assertion of that sort and it is not true, they are just as responsible as if they knew it was false. That is the law. Did it know that the land was not worth $350 an acre? Should it have known it? Value means the reasonable market value that prevails for like lands in that locality. The price that someone pays who is not [33] compelled to buy, but who would buy the land, and from someone who was not compelled to sell but who would sell. If it was not worth $350 did defendant know it? If it did not know it, why shouldn't it know it, having its experts, and dealing with the land for eight or ten years before it sold to the plaintiff?

So if you find by the greater weight of the evi-

dence that the defendant made this positive assertion as to the adaptability of the land to commercial orcharding, which it did, or knew that the value was not $350 an acre, or should have known it, the plaintiff's case is so far made out."

XII.

The Court erred in instructing the jury on the question of defendant's intent to deceive the plaintiff, as follows:

"Then you come to the next step: Did the defendant make those representations with the intent that plaintiff would believe them, rely on them, and be induced to buy the land? Well, the whole case is nothing more or less than a common sense proposition, Gentlemen of the Jury, and this is one of the clearest parts of it. What does a man advertise for but to persuade his prospect to believe what he advertises, and to rely on it, and to act on it, and to come in and buy? There should be no hesitancy on your part over that. Undoubtedly the defendant intended its advertising to be believed, and to influence the prospect, and to induce him to enter into a bargain with him to buy the land." [34]

XIII.

The Court erred in instructing the jury on the question of plaintiff's belief in the alleged representations and his reliance thereon, as follows:

"Finding that made out by the greater weight of the evidence, if you do, then plaintiff's case is so far made out, and you proceed to the next step: Did the plaintiff believe those representations, did

they influence him, in whole or in part, did he rely upon them in whole or in part, and was thereby induced to buy the lands, which otherwise he would not have bought? Of course, if regardless of those representations in the book, and by Amblad, in so far as Amblad made them, plaintiff would have purchased the land, then, of course, the representations are immaterial, they cut no figure, because if you will buy regardless of the representations, if they did not influence you, you cannot say you were damaged by them.

What is the situation in respect to that? Plaintiff was a Minnesotan, if I remember right. He fell in with Amblad down in North Dakota, and discussed this land. First he had the book. He never had been to California. I am taking his statement for it. He says he did not know anything about California lands, fruit lands, or what they were adapted to, or the manner of raising California fruits, commercially or otherwise. He says he did believe Amblad, and he believed the book. Ask yourselves why he shouldn't. Why shouldn't he believe them and act upon them? He entered into a contract after they had been made to him, and turned over some property right [35] in the beginning to the defendant. He signed what is called an application. He made an offer to buy the land for $14,000, provided the defendant would accept the offer. Eventually, the defendant did accept it. That is the form it took, an offer, and the other party accepted it. I do not remember when it was accepted, but so far as plaintiff knew it was not

accepted until after he had been out in this country. After the plaintiff discussed the matter with Amblad and read the book, he said he came to California to look at the land. He talked to Amblad, and listened to his reports with respect to the property, and when he came to Sacramento he found Amblad right at the depot. Amblad took him along. Was that for the purpose of making sure of him, and seeing to it that he did not fall into the hands of somebody else? Ask yourselves that question. Amblad took him around for four days. Plaintiff says they were on this land only once. He did not see anything wrong with it. They made a casual inspection. Amblad says they just walked over it and made a surface inspection. Amblad says, I think, they were on the land three or four times. He viewed your city here—which was attractive, of course, and the orchards up in Carmichael and elsewhere, and showed him what his own land would probably arrive at in the course of time, the plaintiff says. For what other purpose would a real estate man take a prospect out to other sections to show him growing orchards? The plaintiff says Amblad told him his land would be like that when it was planted sufficiently along with fruit for commercial purposes. [36]

There is a rule of law, Gentlemen, which is this: If the party does not rely on the representations made to him, but relies upon what he sees, sees upon the land, and if he discovers the truth in his inspection, then, of course, he cannot say he relied on representations. But you must remember that

the plaintiff was dealing with experts, and that he was not an expert on California lands and fruit lands; whether the vital elements were in the soil, as you look at it, is not obvious by a surface inspection, which he and Amblad said only was made. Apparently it is a matter of dispute to-day between experts whether that land is fertile, and whether it is adapted to commercial orcharding. The law does not require him to employ experts. You can presume that he knew what a man of his experience would know, by going out and looking at the land, like he and Amblad says the plaintiff did. The mere view would not expose how much hard-pan was under the ground, or the depth of the hard-pan. Whether it would tell the average man that it would defeat commercial orcharding is a matter that you will determine. He says he did not see the hard-pan. Nobody says it was visible on the land at that time. He says he was not told anything about hard-pan while out on the land. He says he did not see the hard-pan, and knew nothing about it, though Amblad did tell him, he says, that there was a thin crust of hard-pan, which breaks easily, and is good for the soil. The plaintiff says he saw in the book that there was hard-pan. The book says the hard-pan is hard clay. Davis says it is sandstone. The samples are before you, and submitted to your inspection, in determining [37] whether the book was fair in calling it hard clay, or whether it is stone. I think Mr. Twining did not characterize it, except that

perhaps by inference he agreed with the book, because he said it would slack by air and moisture.

Having inspected the land thus far, a surface inspection, to see the lay-out, as Amblad said, and plaintiff said—plaintiff says he was there once, Amblad says several times—the plaintiff went east. Then he wrote to the defendant, 'Let the bargain go through, I found more than I expected.' What does that indicate to you? What would a reasonable person infer—that he found out that the land was not worth $350 an acre? That he found out that it was not adapted to commercial orcharding? If he had found out those things, would he have likely went on with the bargain and paid $14,000 for the forty acres? You may see in those letters the extent of plaintiff's inspection, and whether he did discover anything to show him that those representations were false. The *brain* (bargain) was made. He did buy. Later on he came out. After that he served as agent, to some extent, under Amblad, and was offering the lands. He is entitled to the same presumption that any man is, that he intended to act fairly and honestly with his prospective customers. Ask yourselves if he had been deceived whether he would not have made clamor earlier to get his money back, and whether he would have likely gone out and endeavored to sell those lands as a subagent for Mr. Amblad. Those letters, again, indicate to you that he still was ignorant that the representations made [38] to him were false. Whether you will take it as such is a matter for you. Take a common-sense view of it, put

yourselves in the same position, and ask yourselves what you would likely have done under like and similar circumstances.

So, if he relied on those representations, in whole or in part, and if his inspection, alone, as he gave it, did not undeceive him, then he is entitled to recover in this action, provided he was damaged."

XIV.

The Court erred in instructing the jury on the question of the date of the alleged discovery of the falsity of the representations, as follows:

"But that is not quite all of the case, Gentlemen. The next step is, did he bring his suit in time? The law is that a person who has been defrauded, as plaintiff alleges that he was in this case, must bring his suit within three years after he discovers the fact. Of course, if he is defrauded he is deceived, he is in ignorance. The law says the moment that that ignorance is dispelled and you discover you have been deceived, you must bring your suit within three years thereof or you cannot sue at all. That is the policy of the law. The reason for that is so that lawsuits will not hang in the air eternally. And that policy of the law, Gentlemen, must be upheld. If the plaintiff was defrauded, he was defrauded when he purchased the land in 1922. He brought his suit on February 29, 1928. So you see the three years within which he could bring his suit commenced to run on March 1, 1925. If he had found out before March 1, 1925, [39] that these reprsentations, or either of them, was false, if he found it out before March

1, 1925, he brought his suit too late, and he is not entitled to recover, and it is your duty to return a verdict in favor of the defendant, no matter how much he was deceived or defrauded. So, if he found the fact out before March 1, 1925, he brought his suit too late, and he cannot recover here. Did he find it out? It must appear by the greater weight of the evidence that he did not. Again, you take into consideration all the circumstances—his experience, whatever it was, and his ignorance of California lands, in fruit lands—whatever it was. You take into consideration the fact that he came here in 1922, he came in July, 1922, but he never lived on the land, never did any work on it, never opened it up. The inference is he rested confidently on the representations that had been made to him, and that induced him to buy, and, of course, what he saw casually in the neighborhood. He lived in town all the time, worked at the carpentering trade, here. There is no dispute about that. I don't remember that he said that he worked at the carpentering trade back east. Perhaps he did. Whether he has not been frank with you with respect to his vocation is a matter for your consideration, and the weight of it is for you. He says he heard nothing about the land, no one told him it was not worth so much money, no one told him it was not adapted to commercial orcharding, and he did not know. As I said before, it does not seem to be an easy thing to determine, because, even to-day, the defendant insists these representations were true, and the experts differ. It is for you to [40]

determine whether they were or were not true. So, was this plaintiff bound to know? Did he know? If he could have known by the inspection of the land, that put him on notice, if that had given him sufficient information that the ordinary man would discover the truth from that, then he would be bound. If he could have thus found out before March 1, 1925, if he saw enough to put him on inquiry—and, again, you put yourselves in the same position—then he was bound to pursue the inquiry, to find out whatever it would have disclosed. Would it have disclosed to him that the land was not adapted to commercial orcharding, or that the land was not worth $350 an acre? He is not bound to accept casual observation as true, even if he heard of it. He says he did not. He was not bound to employ an expert. The experts still differ. You are to determine the truth between them. But it appears that on March 14, 1925, he did write to Amblad, stating, 'My boys say they cannot grow fruit successfully there.'

They had not tried it out. That was the boys' opinion. Whether they knew any thing about it, we don't know. They were Minnesotans, too.

Then it says, 'A neighbor planted a vineyard which dried out.' This is the exact language: "Our neighbor put in twenty acres of grapes and they dried out'—not 'died out' as it was read to you, but 'dried out.' I think that is the way it was read to you, although I may have been mistaken in hearing it read. And then there is something said about the grasshoppers having gotten

in there. Well, does that indicate that he did know, or had sufficient knowledge to know on March 14, 1925, when that letter was written? [41] And from that, will you infer backwards that he knew it before March 1, 1925, or, rather, has he proven by the greater weight of the evidence that he did not know before March 1, 1925, that these representations were false, that the land was not well adapted to commercial orcharding, and was not worth $350 an acre? Unless you find by the greater weight of the evidence that he did not know it, that is, if you find by the greater weight of the evidence that he did not know it before that time, then you will find for him."

XV.

The Court erred in instructing the jury as to the definition of a commercial orchard, as follows:

"A commercial orchard is not to be tested out by one year of a great crop, or by one year of a failure. No. The same as in your business, you do not determine whether your business is a good business by the fact that you made a whole lot of money one year, and that you didn't make any money in another year. A commercial orchard might be said to be one which, with reasonable care and diligence, will produce crops of such reasonable size that through the period of years over which the orchard should live, with the average markets that are likely to prevail, will make a profit on the whole enterprise. The book says that a commercial orchard does not begin to produce commercially for five or seven years after it is planted.

It takes time to test it out. So that for all those years there is a great deal of care and a great deal of expense. Eventually, when it does begin to bear, it must not only liquidate that expense, but also for [42] the series of years it must show a profit, and also during the time it reasonably ought to live. Mr. Davis says the trees will not live long enough on these shallow soils to accomplish that, namely, a fair return on your investment for the time your land is devoted to that particular orchard. That is the same in your business, Gentlemen. Your business is not commercially profitable unless through the series of years you operate it it liquidates all the overhead and pays taxes, and expenses, and something besides.

So that in weighing the testimony of the witnesses, both for the plaintiff and the defendant, you take into consideration how much they know about it. Is their experience on the land long enough to be worth anything? Does it indicate anything with reference to the adaptability of the land to commercial orcharding?"

XVI.

The Court erred in refusing to instruct the jury, on the statute of limitations as requested in defendant's proposed instruction No. 1, reading as follows:

"DEFENDANT'S INSTRUCTION No. 1.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiff must show that the fraud occurred within three

years of the commencement of their action for relief, or if his action was commenced more than three years after the fraud occurred, then he must show, in order to maintain his suit, that he did not discover he had been defrauded until a date within three years of the time he commenced his action. [43]

With regard to this discovery of the fact constituting the alleged fraud, you are instructed that the plaintiff will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiff has proven by a preponderance of the evidence both that he did not discover the alleged fraud within the period of three years before he filed his action, and that he could not have discovered it by the exercise of reasonable diligence, three years before he commenced his suit. He was not permitted to remain inactive after the transaction was completed, but it was his duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to him. He is not excused from the making of such discovery even if the plaintiff in such action remains silent. A claim by the plaintiff of ignorance at one time of the alleged fraud, and of knowledge at a time within three years of the commencement of his action,

is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiff contracted with defendant to buy [44] land. Plaintiff commenced his action on the 28th day of February, 1928; their contract with the defendant for the purchase of its land was made in September, 1922. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiff in the making of this contract, then before you can find a verdict in his favor, you must also believe from a preponderance of the evidence that he neither knew of the fraud, nor could, with reasonable diligence, have discovered the fraud before a date three years prior to the commencement of his action, that is, before the 28th day of February, 1925. If you believe from a preponderance of the evidence that plaintiff either knew of the fact constituting the alleged fraud before February 28, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant."

XVII.

The Court erred in refusing to instruct the jury concerning the effect of the discovery by plaintiff of the falsity of the alleged representations, as re-

quested in defendant's proposed instruction No. 2, reading as follows:

"DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiff's discovery of the alleged fraud that if plaintiff discovered that a material representation concerning the land he bought was false, then he was at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring his action within three years of the discovery of the falsity of any material representation concerning the land." [45]

XVIII.

The Court erred in refusing to give defendant's proposed instruction No. 4, concerning the difference between representations of fact and of matters of opinion. This instruction reads as follows:

"DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation."

XIX.

The Court erred in refusing to instruct the jury concerning the effect of plaintiff's having been able,

by reasonable diligence, to discover the alleged falsity of the representations as to value, as requested in defendant's proposed instruction No. 5, reading as follows:

"DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiff discovered, or by the exercise of reasonable diligence could have discovered the falsity of the alleged representations as to value of the land he bought more than three years before he commenced his action, then your verdict must be for the defendant." [46]

XX.

The Court erred in instructing the jury that defendant, in its booklet represented plaintiff's land to be well adapted to the growth of deciduous fruits commercially, and that the statements in defendant's literature applied to the land purchased by plaintiff.

To all of which defendant duly excepted.

WHEREFORE, defendant prays that said judgment be reversed and held for naught, and that defendant be restored to all which it has lost by reason of said verdict and judgment.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 28th day of November, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 30, 1928. [47]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 18th day of October, 1928, the above-entitled cause came regularly on for trial before Hon. George M. Bourquin, Judge of said District Court, and a jury impaneled and sworn to try said cause and the issues presented by the complaint of the plaintiff and the answer of defendant, plaintiff appearing by his attorneys, George E. McCutchen and Ralph H. Lewis, and the defendant by its attorneys, J. W. S. Butler and Edward P. Kelly; and thereupon the proceedings taken, the evidence given, the objections made, the rulings thereon and the exceptions thereto were as follows:

TESTIMONY OF N. H. NEPSTAD, IN HIS OWN BEHALF.

N. H. NEPSTAD, plaintiff, as a witness on his own behalf, testified:

In 1922 I was living at Minot, North Dakota. I

(Testimony of N. H. Nepstad.)

had never been to California at that time and knew nothing about California fruit raising nor the values of California lands. About that time I came into a deal with the Sacramento Suburban Fruit Lands Company. [48] I received the literature first. The book shown me, entitled "Poultry Farms and Orchard Homes, Second Edition," is a copy of the book that I got. I read it through.

(The book was received in evidence for the purpose of showing defendant's representations as Plaintiff's Exhibit 1.)

I dealt with Mr. Amblad. I had three conversations with him before I came out to look at the land. I was called to the office and he showed me the book, the album that he had there, and the pictures of fruit-trees and chickens. He explained to me the general scheme under which they were selling the land. He said, "You start with some chickens first until the fruit-trees come into bearing." He told me how to plant the trees. He said I should plant the trees first, and between the rows I should plant grape-vines, and when the vines were about three years old there would be crop enough to pay for the land, and when the fruit-trees came into bearing I could grub out the grape-vines. He said the land was good and fertile and rich, and will grow all kinds of fruit that can be grown in California—peaches, pears, plums and figs. He said the land was worth three hundred fifty dollars an acre, and he was selling it to me at that price. He said it would soon be worth four

(Testimony of N. H. Nepstad.)

hundred dollars an acre. The company was going to raise the price in a few month's time. I believed the things he told me and the things that were stated in the book.

I recognize the carbon copy of a document entitled, "Application for Purchase of Land," dated March 24, 1922. I signed the original on the 24th of March.

(The document was received in evidence as Plaintiff's Exhibit 2.)

Q. I show you a contract dated March 24, 1922, entitled "Contract for Deed," bearing your signature and no other. Did you sign that [49] at about that time, or when did you sign it?

A. I guess that was later on, after I came back from California.

WITNESS.—I made a trip to California in May, 1922. I got here about the 23d of May. Mr. Amblad met me at the depot, and the next day we went around, and the third day we went to Carmichael and Fair Oaks and to Davis. He took me to quite a few orchards in that district, and he took me to the Carmichael district and showed me some orchards there. They looked good to me. At that time he made a statement to me about the Rio Linda lands. He said I could grow just as good fruit up there as down here, in commercial quantities. I believed that. Altogether, I spent four days in Sacramento. I did not make any investigation except with Mr. Amblad.

(Testimony of N. H. Nepstad.)

Q. When you signed this application to purchase this land which already has been identified, did you pay any money down?

A. I was going to deal with my house. I did not give any cash money.

Q. You did not pay any money at that time?

A. No.

WITNESS.—I went back to Minot and saw Amblad, and signed this contract.

(The contract, dated March 24, 1922, covering Lots 101, 102, 107 and 108, Rio Linda Subdivision No. 6, was received in evidence as Plaintiff's Exhibit 3.)

I cannot exactly fix the date when that was signed, other than it was after my trip out here in May, approximately some time [50] in July. I had some more negotiations with him, and moved out to California in July, 1922. I exchanged some of these lands for others. They had a piece there that needed a little more leveling and we asked them to change it, and we did. At the time of the change we signed another contract. This is it. It was signed about October, in the fall of 1922.

(The contract, dated March 24, 1922, describing Lots 102, 107, 93 and 94 of Rio Linda Subdivision No. 6, was received in evidence as Plaintiff's Exhibit 4.)

I never moved on to the land. I followed the occupation of carpenter around town here. I did not spend all my time around Sacramento. I was away in the fall for about three months.

(Testimony of N. H. Nepstad.)

I went out to the vicinity of those lands and looked them over once in a while, maybe half a dozen times altogether. I some some trees being planted in the neighborhood. The trees that were in the neighborhood of my land, I could not say whether they were young or old. I did not go into the orchards. I just saw them from the road. They did not appear to be doing their very best.

I cannot remember that I looked at any trees in 1924, but when I came by Fisher's orchard in 1922 I saw that orchard. It looked pretty good.

I did not find out that the land I had bought was not adapted to tree raising before 1928. On the 7th of February I went up there and dug into it to see how the soil was. I never dug into it before. I had planned to go out there and live on the land. I had not bought it as an investment. I was going to plant it to fruit-trees as soon as I had the money to do it with. [51] I did not have sufficient money. I wanted to pay for the land first.

About February, 1928, I heard that the land was not worth three hundred fifty dollars an acre. They were talking about it; they had a lawsuit. Before that time I had never heard it was not worth that price, and I had never heard before that that it was not fruit land. I had never talked to any of the neighbors out there about it. I had seen trees growing out in the neighborhood.

Cross-examination.

I am about sixty years old. I am married and

(Testimony of N. H. Nepstad.)

have a family. I have two boys, who are now grown. When I figured on the purchase of the land I had in mind the boys as well as myself, to help me on it, to work it. It is not a fact that I bought ten acres for myself and for each of my boys, but I did buy forty acres.

My business was that of a carpenter. I followed that for about thirty years, off and on. During the thirty years I was on a farm for a while. I was raised on a farm in Minnesota. I never farmed anywhere else. I did not operate any farm in Canada. I own farms in Canada, maybe a thousand acres. That is farming land and pasture land. I am not operating that farm. I have sold it. I only have some pasture land left there now. I have been selling now and then since that time. I have not got my book here, so I cannot say just exactly. I did not have any other business except farming.

When I lived in Minot I was doing some carpenter work there. I was not in the real estate business. I was never in the real estate business. I bought land for myself sometimes and sold it again. [52]

In 1921 after I came in contact with the Suburban Fruit Lands Company, I did not engage in the selling of real estate for that company. I told them about a few prospects.

Q. Let me ask you this: In 1921, did you attempt to negotiate, and did you negotiate and solicit purchasers for land in the Rio Linda district, as an

(Testimony of N. H. Nepstad.)

agent of this company, the Suburban Fruit Lands Company? A. Not as an agent.

Q. You didn't?

A. No. I just told them about prospects.

Q. Will you examine that and state whether or not that is your letter?

The COURT.—Is it, or not?

A. Yes, I signed that.

Mr. KELLY.—We offer this in evidence.

(Defendant's Exhibit 5.)

Q. Examine a copy of a letter dated April 7, 1922. Did you receive the original letter of which that is a copy? A. I cannot remember that.

WITNESS.—I had my talk with Mr. Amblad at the same time I received the booklet which has been offered in evidence.

Q. How did you first come in contact with this company?

A. Mr. Shirley saw their advertisement in the paper and he told me about it, and we decided he should write to the company for some information, and then Mr. Amblad came up to Minot and I was called to the office there. [53]

WITNESS.—Mr. Shirley is my son-in-law. He is right here.

I went to California the first time about 1922 in the spring. I cannot say exactly; about March, maybe.

Q. That was before you signed your contract, of course, was it not?

(Testimony of N. H. Nepstad.)

A. Oh, I thought you meant the first time I went to Canada.

Q. No, to California.

A. Oh, to California. I thought you said Canada.

Q. It was before you signed your contract, wasn't it?

A. I signed an application before I came here.

Q. Did you write that letter?

The COURT.—Answer whether you did, or not. Did you or did you not?

A. I never typewrote that; I signed it.

Q. Answer if you signed it.

A. Yes, I signed it.

The COURT.—Proceed.

Mr. KELLY.—We offer in evidence a letter dated Minot, North Dakota, April 11, 1922, to E. E. Amblad, signed by N. H. Nepstad.

(Defendant's Exhibit 6.)

Q. I show you a copy of a letter dated April 13, 1922, addressed to you by the Fruit Lands Company. Did you receive the original of which that is a copy on or about the date it bears?

A. I can't remember that.

Q. I show you a copy of a letter dated April 17, 1922, to yourself from the Fruit Lands Company; did you receive the original of which that is a copy?

A. I can't remember it. [54]

WITNESS.—When I got to California Mr. Amblad was the first person I saw connected with the Suburban Fruit Lands Company. I met Mr. Am-

(Testimony of N. H. Nepstad.)

blad at Minot before that time. I spent about four days, all told, in Sacramento on my first visit. I went on the land which I afterwards purchased just once during that time. I did not communicate with any citizens of Sacramento during that week about this land in Rio Linda. I did not call at the office of any real estate dealers in Sacramento during that time.

When out on the land we looked at it. I did not examine the soil. I did not notice at that time whether or not there was hard-pan there. I did not at that time know what hard-pan was. Mr. Amblad told me a little about hard-pan in Minot, but he said it was a thin crust and it could easily be broken up. It did not hurt the land and it was good for the soil. I did not know what it was.

Before leaving Minot to go to California I read the booklet which has been offered in evidence. When I returned from Sacramento on that trip I went straight home to Minot.

Q. I show you a letter dated May 24, 1922, and ask you if that is your letter.

The COURT.—Is it typewritten?

Mr. KELLY.—Typewritten and signed by Mr. Nepstad.

A. I never wrote it; I signed it.

Q. It is your letter, isn't it? A. I don't know.

Mr. KELLY.—We offer in evidence the letter dated May 24, 1922, addressed to Sacramento Suburban Fruit Lands Company, Sacramento, Cali-

(Testimony of N. H. Nepstad.)

fornia, signed by Mr. Nepstad. I desire to read this [55] letter. It is short:

"Sacramento, Cal., May 24, 1922.

Sacramento Suburban Fruit Lands Co.,

Sacramento, Cal.

Gentlemen:

This is to advise you that I have inspected lots 101, 102, 107, 108 of Rio Linda Subdivision No. 6, for the purchase of which I have made application to you. I do not care to exercise the option to exchange these lots, so that at your convenience you may complete the deal outlined in that application.

Yours truly,

N. H. NEPSTAD.

It is also understood the cost of my trip will be refunded as per letter from Minneapolis."

(Defendant's Exhibit 7.)

The WITNESS.—That was wrote by the company in the office, and I signed it.

Mr. KELLY.—Q. Did you sign that letter—you say you did.

A. Yes, I said I did.

Q. I show you a copy of a letter dated May 27, 1922, addressed to yourself, and signed by the Sacramento Suburban Fruit Lands Company, and ask you if you received the original of which that is a copy? A. I can't remember that.

Q. I show you another letter, dated May 29, 1922, addressed to the Sacramento Suburban Fruit Lands

(Testimony of N. H. Nepstad.)

Company, Minneapolis, Minnesota, and signed N. H. Nepstad; is that your letter? A. Yes.

Q. All in your handwriting, isn't it?

A. Sure. [56]

Mr. KELLY.—We offer in evidence the letter dated May 29, 1922, addressed as above indicated, and signed as above indicated. A part of this I desire to read, and only a part:

"Minot, May 29, 1922.

Sacramento Suburban Fruit Lands Company,
Minneapolis, Minnesota.

I arrived back from my trip to Sacramento, Calif. yesterday 6 A. M. and found everything more than I expected it to be out there, and I certainly enjoyed the visit. I am leaving for Canada tomorrow, and expect to stay there about five days, away. I will wire you just as soon as I come home, so that Mr. Amblad can come up and fix up my deal and see some other parties here that are interested in your California lands."

Q. After writing that letter, did you sign the contracts which have been offered in evidence here?

A. Yes, I signed the contract.

WITNESS.—After signing those contracts I moved with my family to Sacramento, the latter part of July, 1922. Only one boy went with me. The other little boy was not with me. He was down in Los Angeles. He came up with me to Sacramento later on. One of my boys is about thirty-five, and the other twenty-six years old.

(Testimony of N. H. Nepstad.)

I did not do anything to improve this land right away. I did not have sufficient money to go on with it. The boys did not go onto the land. I started in carpenter work at Sacramento. I did some contracting, and I was working for others. I built some homes myself, just two. I still have them. I couldn't sell them. I was not engaged in anything else after coming to Sacramento up to [57] the present time.

I did not go into the real estate business in any way or to any extent after coming to Sacramento. I have not had real estate here.

Q. Did you negotiate, or attempt to negotiate, or solicit purchases of real estate in this Rio Linda Colony, as an agent for this Sacramento Company, the defendant in this lawsuit?

A. I cannot say as an agent; I told them about some prospects, some buyers.

Q. Did you solicit the sale of any of those lands to prospective purchasers after that time, after coming to Sacramento to live? Did you, or didn't you?

A. Well, I told them about prospects. I did not close any deal.

Q. I show you a telegram dated June 15, 1922, signed by yourself. Did you send that telegram?

A. I can't remember.

Q. I show you two telegrams, one dated June 12, 1922, signed by yourself, addressed to E. E. Amblad, and a reply dated June 15, 1922, addressed to you,

(Testimony of N. H. Nepstad.)

and signed by E. E. Amblad; did you send one and receive the other of those two telegrams?

A. Maybe I did, if it is here.

Mr. KELLY.—We offer in evidence the three telegrams described as above.

Mr. McCUTCHEN.—We object to them as immaterial, irrelevant and incompetent, and they are not sufficiently proved. I don't understand the witness to say that he did; he says maybe he did.

The COURT.—He has not admitted them. Objection sustained. [58]

Mr. KELLY.—Q. Mr. Nepstad, did you or did you not send and receive these telegrams?

A. Well, I can't remember for sure.

Q. Will you say you did not?

A. I won't say that, either. I don't remember.

Mr. KELLY.—We renew the offer.

Mr. McCUTCHEN.—The same objection.

The COURT.—Objection sustained.

Mr. McCUTCHEN.—We think, your Honor, this whole thing is not cross-examination. What difference does it make, anyway?

The COURT.—Well, I have not looked at them. The objection, as made, is good, however. Proceed.

Mr. KELLY.—Q. I show you a letter dated August 8, 1922, and ask you if that is your letter, and in your handwriting, and signed by you.

A. Yes.

Mr. KELLY.—We offer in evidence a letter dated August 8, 1922, addressed to the Sacramento

Suburban Fruit Lands Company, and signed by Mr. Nepstad.

Mr. McCUTCHEN.—We have not had an opportunity to examine these letters, your Honor.

The COURT.—Well, they are either material or immaterial.

Mr. McCUTCHEN.—What is this about?

Mr. KELLY.—About the sale of the land.

Mr. McCUTCHEN.—If they are just mentioning prospects, we object to it as immaterial, irrelevant and incompetent.

The COURT.—What is there in the letter that you claim is material?

Mr. KELLY.—The letter shows his negotiations selling [59] real estate for this company. Not only that, but also as to his reliance upon the representation that—

The COURT.—Well, just read what there is in it that you want to show:

Mr. KELLY.—

"Sacramento, California, August 8, 1922.

Mr. Edward Amblad,

Minneapolis, Minnesota.

Dear Sir:

Your letter of the 4th instant received and see that you want to know something about our trip out here and the roads, and I have to say that we have some bad roads and some good roads and about 400 miles of paved roads, and if we was to make the trip over again we would go the same way,—"

(Testimony of N. H. Nepstad.)

The COURT.—Well, well, if there is anything material in it, come to it.

Mr. KELLY.—This part of it: "I expect to start from here on about the 15th to help them take in the big crop. Hope they will get it all threshed in good shape so as to get a good sample for it and if they get more money than they can handle I will try and sell them some of your California lands if there is any commission in it for me, and if I can hang a few on the fence you might come and help me close the deals. We all send our best regards to you."

The COURT.—Proceed.

(Defendant's Exhibit 9.)

Mr. KELLY.—Q. I show you a letter dated April 6, 1923, and I will ask you if that is your letter, in your handwriting, and signed by you?

A. Yes. [60]

Mr. KELLY.—We offer in evidence the letter dated April 6, 1923, to Mr. Edwin E. Amblad, and signed by Mr. Nepstad.

Mr. McCUTCHEN.—What is the purpose of this letter?

Mr. KELLY.—For the same purpose as the one heretofore offered.

Mr. McCUTCHEN.—The same objection.

The COURT.—Point out what is material in it.

Mr. KELLY.—The materiality of this letter is right at the beginning of it: "Your letter of the 3rd instant received. I did send my land contract

(Testimony of N. H. Nepstad.)

to Sacramento, so cannot figure up the interest. I know the payment is $1295.40 plus interest to be reducted, and I was to have commission for the land sold to Torger Olsen, T. J. Cummins and R. E. Mackersee, all of Minot. Maybe you have overlooked this, but I have a letter to show from the company that they promised me 5 per cent. of all the sales that I could hang on the fence at Minot, and I surely did put those parties on the fence, and worked hard for it, and I can prove it by the parties that I did, so please send me a statement and I will send you a check for same."

(Defendant's Exhibit 10.)

The COURT.—Proceed.

Mr. KELLY.—Q. I show you a letter dated April 27, 1923, addressed to Mr. F. A. Bean, signed by yourself, in your handwriting. Is that your letter?

A. Yes.

Q. Who is F. A. Bean?

A. He is one of the firm.

Q. One of the Sacramento Suburban Fruit Lands Company? A. Yes.

Mr. KELLY.—We offer in evidence the letter dated April 27, 1923, addressed and signed as heretofore indicated.

Mr. McCUTCHEN.—We object to it as immaterial, irrelevant and incompetent, and not proper cross-examination. [61]

The COURT.—What is there in it that you claim is material?

(Testimony of N. H. Nepstad.)

Mr. KELLY.—It is a short letter:

"Mr. F. A. Bean,

Minneapolis, Minnesota.

Dear Mr. Bean:

Your letter of the 20th instant received. Find enclosed check for $44.81, for taxes on Minot property. I had overlooked this and remember now that I made those taxes in two payments, and I had not paid the last one, and, as you say, I was in a hurry to leave for Sacramento, I and my friend Mr. Amblad overlooked it. When Mr. Amblad comes to Storthooks he better leave Minneapolis Sunday evening or Wednesday evening to get the train here, and he has to go by Winnipeg. The snow is going and we can get around and see our parties now. Wish that he could soon come now because I am just about ready here, and would like to get home to good old California.

Yours truly,

N. H. NEPSTAD."

Mc McCUTCHEN.—We withdraw our objection to the letter.

The COURT.—Very well.

(Defendant's Exhibit 11.)

Mr. KELLY.—Q. I show you a copy of a letter dated April 11, 1923, addressed to yourself, signed by the Sacramento Suburban Fruit Lands Company, and ask you if you received the original of which that is a copy? A. I can't remember that.

Q. I show you a copy of a letter dated October

(Testimony of N. H. Nepstad.)

29, 1923, addressed to yourself, signed by the Sacramento Suburban Fruit Lands Company, and ask you if you received the original of which that is a copy, on or about the date it bears? [62]

A. Well, it might be something like that. I have not got time to read it over, so I cannot say for sure.

Q. Will you say you did not receive that letter?

A. No. I cannot say that I did. I don't know if I did.

WITNESS.—From the time I moved my family to Sacramento, it was the 7th of February, 1928, before I made any personal inspection of the soil on this land. During the time I lived here, from 1922, I went out there a few times. During that period of time I went on the land of some of my neighbors and talked to them. I cannot remember their names. I saw some fruit orchards growing in the neighborhood of my land during that time. They did not look so very bad. I don't know much about fruit anyway. There is a big difference between them and the fruit orchards that were shown me upon my first trip of inspection. I did not find any commercial orchards in the neighborhood of my land during none of that time. I could not say that I have seen trees dying, either in family orchards or commercial orchards, in the neighborhood of my land during that time, because I did not inspect them very close anyway. I saw the fruit-trees which were planted in the vicinity of my land. I did not see them actually planting trees, nor blasting holes for planting trees. I did

(Testimony of N. H. Nepstad.)

not see the digging of wells or well pits on any of the lands in the neighborhood of my land. I did not examine the soil of any of the lands near mine during that time. I did not inquire of any of the neighbors during all of these years about the soil. I did not inquire of any of the neighbors or the people in Sacramento as to whether or not fruit could be grown on this land. I made no inquiry whatsoever. During all that time up until February, 1928, I believed that fruit [63] could be grown on that land which I bought, and believed during all of this time up to February, 1928, that fruit of all kinds could be grown generally in the vicinity of my land. No one had ever told me to the contrary, and I had no notice that fruit would not grow.

Q. I show you a letter dated March 4, 1925, addressed to Mr. Edward E. Amblad, Minneapolis: Is that letter signed by you in your handwriting?

A. Yes.

Mr. KELLY.—We offer in evidence a letter dated March 4, 1925. I will not read the entire letter, just the portion that is material. This letter is dated March 4, 1925, addressed to Mr. Edward E. Amblad, Minneapolis, Minnesota. It was written from Sacramento, California. I will skip the first three pages and read the last page:

"My boys are afraid of the chicken business. They cannot see any money in it, and they won't go out there, and they say they cannot raise fruit to any success. Our neighbor put in twenty acres

(Testimony of N. H. Nepstad.)

of grapes and they died out, and the grasshoppers also got after them, and they was all cleaned out, and anyway, I haven't got time," etc., etc.

(Defendant's Exhibit 12.)

Q. From the time you purchased this land, to the present, have you attempted to make any improvements, whatsoever, upon that land?

A. No, I have not had the money to do it with.

Q. None of the 40 acres? A. No.

Redirect Examination.

Mr. McCUTCHEN.—Q. In this letter you say something [64] about your boys and fruit. Will you explain that? Did your boys tell you that they could not make any money in chickens out there?

A. Well, if it is there they must have told me.

Q. Did they or did they not tell you?

A. Well, they did.

Q. Did they say to you that they could not raise fruit to any success out there?

A. The boys, you mean?

Q. Yes. Who did you mean by "They say they cannot raise fruit to any success"?

A. I don't know what I meant by it.

Q. Would it help you if I showed you the letter again? A. Maybe it would.

Q. Did your boys and you have some conversation about fruit raising there?

A. We have talked about it, but we never came to do it. We never had the money to go out and do it with.

(Testimony of N. H. Nepstad.)

Q. Did you know about the grasshoppers coming through there at one time?

A. Yes, I heard about grasshoppers coming through there.

TESTIMONY OF T. F. SHIRLEY, FOR PLAINTIFF.

T. F. SHIRLEY, a witness for plaintiff, testified:

I am a son-in-law of Mr. Nepstad. In 1922 I was living in Minot, North Dakota. I was present at some of these conversations with Mr. Amblad. We looked the booklet over and he said that the land was worth fully three hundred fifty dollars, and it would be advanced in price the next year; that all the locators out here were happy. They had their fruit lands, and poultry, and [65] were making a success of it. He said the land was good for everything except pineapples and bananas, and he didn't know about those, because they never had been tried.

Cross-examination.

The first conversation in which I participated between Mr. Amblad and Mr. Nepstad was in F. W. Youngman's office. He was an insurance man and realtor in Minot, North Dakota. I was not employed at that place. I was credit manager of the Northern State Power Company.

Q. How did you come to be present there at that time?

(Testimony of T. F. Shirley.)

A. I was instrumental in getting my father-in-law to come here. I answered an advertisement that appeared in the paper. I think it appeared in the "Minneapolis Journal." I answered that, asking for information. We all wanted to come to California. I answered the letter. I think it was referred to Mr. Youngman, as being an agent. Naturally I was interested, and I was present.

Q. This letter I show you, dated February 18, 1922, is that the letter that you addressed to the Sacramento Suburban Fruit Lands Company, asking for their literature? A. Yes.

Q. I will ask you to examine this letter while I am introducing this first one.

I offer this letter in evidence.

(Defendant's Exhibit 13.)

Q. Did you receive that letter in reply?

A. I guess I did; I must have.

Q. And you received the booklet, No. 2, at the same time, did you?

A. I don't exactly recall. I believe so, yes. I think I did. If I could read that letter I could tell you. [66]

The COURT.—Well, well, is it material? Does it make any difference?

Mr. BUTLER.—I think not, your Honor.

The COURT.—Then what is the use of going into it?

Mr. BUTLER.—I will offer it in evidence.

(Testimony of Howard D. Kerr.)

The COURT.—There is no dispute about the letter at all.

(Defendant's Exhibit 14.)

Mr. BUTLER.—Q. It was your suggestion, made to your father-in-law, that led to his investigating the matter and taking it up with the company?

A. I believe so, yes.

TESTIMONY OF HOWARD D. KERR, FOR PLAINTIFF.

HOWARD D. KERR, a witness for plaintiff, testified:

I am a real estate broker in the Nicolaus Building, Sacramento, California. I have been in the real estate business in Sacramento for twenty-two years, and have had experience in buying and selling country lands in this county. I am familiar with prices and values of country lands around in 1922.

I have been on the Nepstad lands, and I made an appraisal of the forty acres known as Lots 102, 107, 93 and 94, Rio Linda Subdivision No. 6, as of 1922. There would not be any difference in price, I don't think, between the price in March and in October of that year. During that period the fair and reasonable market value of that land was seventy-five dollars for 93 and 94, and fifty dollars for 102 and 107.

Cross-examination.

I made the inspection of the whole forty acres the day before yesterday. I was on the land about

(Testimony of Howard D. Kerr.)

half an hour, I guess. [67] That was the first time I had seen those particular pieces of land.

Q. You examined some land in that vicinity a few *years* (days) ago, belonging to H. A. Lindquist, did you?

A. I examined a piece adjoining this on the north, the northwest corner. I don't just remember whose piece it was. The Hayes piece, I believe it was.

Q. I asked you about the H. A. Lindquist piece. You testified in that case the day before yesterday?

A. Oh, yes.

Q. How did the land you inspected for Mr. Nepstad compare with Mr. Lindquist's land?

A. Which contract do you mean, 93 and 94 or 107? Are you referring to 93 and 94?

Q. Either one, or both.

A. There is a vast difference between the two. 93 and 94 are practically about the same as the Lindquist piece. It has about the same value.

WITNESS.—The others are not so good. I could tell that very easily by a mere casual inspection at the time I was there. They did not require borings or anything of the kind to determine that. I did not make any borings myself upon the soil of this man, the plaintiff in this case.

Q. You did not take into account the character or nature of the soil?

A. It was practically about the same, with the exception of some low land. [68]

(Testimony of Howard D. Kerr.)

WITNESS.—I have made no borings in that country at all.

In fixing my value I took into account the adaptability of this land and soil for raising chickens mostly and greens, and feed for them; a place to live, and school facilities, roads, etc., if anyone wanted to live in that location, and its proximity to the City of Sacramento.

Q. Did you take into consideration the adaptability of that land to the growing of family orchards? A. I don't think it could be done.

WITNESS.—But I did take that into consideration, and the adaptability of that soil for the growing of commercial orchards.

In my judgment, as I examined that land the day before yesterday, it was not adapted to the growing of fruit. It might produce a family orchard for a while.

I made an appraisement of lands in the East Del Paso district for T. Wah Hing in 1927, I believe; I am not sure. This land is located about six miles from Sacramento, five miles from the city limits, north of Sacramento, and about four miles southwest of the Subdivision in Rio Linda that I examined for the plaintiff in this lawsuit. The land I examined for T. Wah Hing was platted into lots. I do not know the size of those lots. I did know at the time, but I don't know now. From this plat of East Del Paso Heights shown me I think the figures show the lots are one hundred twenty-six feet deep, with fifty foot frontage.

(Testimony of Howard D. Kerr.)

Great Western Power case, was that farm land, or was that subdivision property?

A. Subdivision property.

Q. And how close was that to North Sacramento?

A. It is North Sacramento suburban property. It is outside the city limits of North Sacramento.

Q. On your direct examination you said that $75 for 93 and 94; that was $75 per what?

A. $75 per acre.

Q. And you said $50 for 102 and 107; that was $50 per what? A. $50 per acre. [71]

TESTIMONY OF R. B. LOUCKS, FOR PLAINTIFF.

R. B. LOUCKS, a witness for plaintiff, testified:

I live in the Rio Linda section. I know the Nepstad land. I live across the road. My land is very similar to the Nepstad land.

I have made some efforts to plant trees on my land. I have sixty in the family orchard. I planted them in the spring of 1924. I cultivated and watered and pruned them. They done very well for the first two or three years, aside from the first year, when the grasshoppers ate up some of them, and until 1927, when I lost twenty-seven of them.

At one end of the orchard there is about three and a half feet of soil, and at the other end it runs down to a foot and a half. I lost the trees in the shallow soil. The trees on the three foot soil, or

(Testimony of R. B. Loucks.)

three and a half feet, are about twice as large as the trees in the foot and a half soil. The general condition of my trees is very poor, with the exception of about half a dozen in the deeper soil. Those are just fair.

I have tried to raise figs and grapes on that land. I set out about three hundred figs, and about sixteen hundred grapes. The figs are about one-third dead. I think there are ninety-nine out of three hundred missing. The grapes are probably three-quarters dead. I cared for them and cultivated them up to this year, and I cultivated them once this spring.

I have lived in that district since the fall of 1923. I never heard it was a matter of common knowledge before 1927 that these lands would not raise fruit, or that they were not worth three hundred fifty dollars an acre. [72]

Cross-examination.

I don't remember if I wrote a letter to the company some time in 1925, describing my experience relative to the raising of fruit on my land. They had a letter signed by me published in one of the booklets which the company issues.

I am a plaintiff in a similar lawsuit, and am a contributor to a general fund for the maintenance of actions of that kind. My suit has already been tried and determined.

TESTIMONY OF H. L. FREDERICKSEN, FOR PLAINTIFF.

H. L. FREDERICKSEN, a witness for plaintiff, testified:

I did live in the Rio Linda section at one time. I moved out there first in 1922. I left there about the 9th or 10th of July. I had some land out there in Subdivision 6.

I know the Nepstad land. It is about half a mile or three-quarters of a mile from mine. I made an effort at tree raising out there. I planted sixty-seven or sixty-eight in 1924. I cared for those trees and cultivated and pruned and irrigated them. They did pretty well the first two years, and then started to die out. In 1926 I think about six died, and in 1927 about thirteen or fourteen died. The soil was from eight inches to twenty-four inches deep.

I had some farming experience before I came here, all my lifetime. I have observed other efforts out there towards tree raising. I tried to raise wheat and barley and oats, but it don't pay to work the land.

It is not possible to raise fruit in any quantity successfully on my shallow hard-pan land. [73]

Cross-examination.

My land is about half or three-quarters of a mile, I should judge, from the plaintiff's land. I am not sure, but it is something like that.

(Testimony of H. L. Fredericksen.)

I am a plaintiff in a lawsuit in this court of the same kind we are trying here to-day and am a contributor to the fund for the maintenance of these series of actions.

Redirect Examination.

Before 1927 there was never any idea in this neighborhood, or any talk, that this was not fruit land. Most of the trees started to die in 1927. There were just a few settlers in Subdivision No. 6 when I came there in 1922, and were no trees planted around there in 1922, but there were some in Subdivision No. 5. I think they first started planting trees around there in any quantity in 1924.

Recross-examination.

I don't know whether the sour sap was general over the fruit country or not in 1927.

TESTIMONY OF ADOLPH STERN, FOR PLAINTIFF.

ADOLPH STERN, a witness for plaintiff, testified:

I live in Subdivision 5 of Rio Linda. I know the Nepstad lands. They are from half a mile to three-quarters of a mile from mine. I tried to raise fruit out there. I planted five acres, or five hundred thirty fig trees, in 1923, and my family orchard in 1924. The trees done fairly well the first couple of years. I cared for them, cultivated, pruned and irrigated them. After the first couple of years they started to grow more stunted every

(Testimony of Adolph Stern.)

year and more uneven. The present condition of my orchard is very [74] poor except in one small space where there are about eight or ten trees in three and a half or four feet of soil. They are eight, ten, or possibly more feet tall, and nice and vigorous. They seem to be nice and healthy. Where the other trees are planted the soil is from six inches up in depth. I blasted for some of my trees. I am not able to observe any difference in the growth where they were blasted and where they were not.

I have made observations around the neighborhood generally as to tree growing, all over east of the creek and over much of the upland country. I have been watching those trees ever since I planted my orchard, because a number of people planted fig orchards and we were rivalling each other to see who could grow the nicest orchard. There was no considerable death of trees out there before 1927.

Q. From this observation, and from your experience out there, is any of that shallow hard-pan land over that way at all adaptable to raising fruit? A. No, sir.

Cross-examination.

I have been a plaintiff in a lawsuit of a similar kind to the one we are now trying in court and I prevailed. I am a contributor to a general fund for the maintenance of this action.

Redirect Examination.

My suit has already been tried and determined.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFF.

HERBERT C. DAVIS, a witness for plaintiff, testified:

I am an agricultural specialist with the firm of Techow & [75] Davis, Engineers and Chemists. My office is at 620 "I" Street, Sacramento. I had about three years' training at the University of California to fit myself for my work. After that I had some practical experience. I was seven years manager of the United Orchards Company at Antelope. I had been on those lands before that a seven year period. My home was out there. I was there about five years before that. Altogether we owned about a hundred fifty acres, and farmed considerably more than that. About a hundred acres was planted to fruit.

With reference to Rio Linda, part of the land we had practically adjoined Subdivision No. 6 on the northeast corner. The lands there are very similar to the land in Subdivision 6, except that land was more rolling. We were unsuccessful in fruit raising in the Antelope district. We had an average depth of about four feet of soil. Some was a good deal deeper. We were able to keep the trees alive on the deepest soil for a long period of years, but we could not make fruit grow on them. There was no yield at all. The enterprise was unsuccessful and very disastrous financially.

(Testimony of Herbert C. Davis.)

We lost forty-seven thousand dollars in seven years.

While I was there I had experience in testing soils. After I left there I have been with the firm of Techow & Davis, and during that period of time I have tested soils and have made soundings and borings and chemical analyses of soil.

I tested the Nepstad land, and made maps showing the depth of soil on that land. These are the maps. The figures in parentheses show the depth of soil in inches. They are correct.

Q. There are some dots on here, and I suppose some dots with circles around them, although I don't see any circles on these now. Are there any circles on these maps, Mr. Davis? [76]

A. There should be, unless I omitted to put them on.

Q. The other numbers simply indicate the boring number: Is that correct? A. Yes.

Q. And down here, this part that is labeled "Ground surface," what does that show?

A. A cross-section through the center of each tract, showing the relation to the hard-pan, clay and soil.

Q. And does that correctly show conditions there? A. Yes.

Q. One shows average depth 23 inches: Is that correct? A. Yes.

Q. And the other shows average depth of 19 inches: Is that correct? A. Yes.

(Testimony of Herbert C. Davis.)

(The two maps were received in evidence as Plaintiff's Exhibits 15 and 16.)

The map shows some clay. That is included in my depth of nineteen inches and twenty-three inches. That layer of clay is an average of five inches thick. Some of it is a tight red clay, similar in color to the surface soil. It contains very little coarse material, and therefore the clay is quite collodial and tightly packed and plastic. It is common clay, such as is used in bricklaying. In other sections of the land the clay seems to be more of an adobe character. There are spots of clay adobe soil on the land. Generally, however, it is red San Joaquin sandy loam. That clay is of no assistance to the land for agriculture. Lying on top of the hard-pan, it is really a detriment.

I made some chemical analyses out there. I used the strong acid soluble method, which is a recognized method for testing soils. The purpose of testing in that way is to determine the amount of plant food in the soil. We call it the potential plant food. It is that amount which, over a period of years—say the life of the orchard—would reasonably be expected to [77] become available to plants. This land had not been tilled at all. There was no sign of any fertilizer or anything. It was bare raw land. I took some samples of it. There was a boring made in each of the three parallel strips across each piece of land, and a sample was taken clear to the hard-pan, and then a composite

(Testimony of Herbert C. Davis.)

sample taken of that. I made a separate analysis of each piece.

Q. Will you give us the result of that analysis?

A. Lots 93 and 95: Potash .112 per cent, equivalent to 4,480 pounds per acre-foot. Phosphoric, .035 per cent, equal to 1,400 pounds per acre-foot. Lime .274 per cent, equal to 10,960 acre-foot. Nitrogen .210 per cent, equal to 8,400 pounds per acre-foot. Humus .24 per cent, equal to 9,600 pounds per acre-foot.

Q. Now, on the second tract.

A. Lots 102 and 107: Potash .093 per cent, equal to 3,720 pounds per acre-foot. Phosphoric acid .027 per cent, equal to 1,080 pounds per acre-foot. Lime .152 per cent, equal to 6,080 pounds per acre-foot. Nitrogen .189 per cent, equal to 7,560 pounds per acre-foot. Humus .21 per cent, equal to 8,400 pounds per acre-foot.

Q. How do those compare with the amount of plant food that ought ordinarily to be in the soil? That is, I am talking only about the potash and phosphoric acid.

A. These analyses are very similar. The potash in both cases is approximately one-third of what we would expect to find in a medium soil, or even a comparatively poor soil; the phosphoric acid is about one-half in each case.

WITNESS.—I made an investigation there to determine the depth of the hard-pan on the surrounding properties where the well pits were open and could be investigated. We found the hard-

(Testimony of Herbert C. Davis.)

pan to be from [78] twenty to thirty feet in thickness. The soil over the hard-pan was—say two feet in one tract. I think it is twenty-three inches. The hard-pan conditions are fairly uniform over the entire tract. There is some slight variation in the character of the hard-pan, and there is some variation in its thickness, but it is fairly uniform. From that examination I made in the neighborhood I can tell the conditions on the Nepstad properties. They would be the same.

Q. Describe that hard-pan.

A. Generally there is a surface strata. That is the first strata you strike in the hard-pan. It is somewhat harder than the material you find a little further down. This would be representative of the first strata of hard-pan. This particular piece came off of Lot 107 of the Nepstad tract. This will run in thickness from several inches. I have seen it a foot and a half or two feet thick in places. That is underlain by a different material. This second piece is what we would generally find as the bulk of the hard-pan. This lies underneath this other material.

Q. How far down does that structure go?

A. This structure goes generally clear to the bottom. This sample was taken from the Jeppson well pit, adjoining Lot 107 on the south and the same material was clear down in the pit.

(The samples of hard-pan were offered in evidence as Plaintiff's Exhibit 17.)

(Testimony of Herbert C. Davis.)

Q. Did you make some hard-pan investigations around there? Where does this piece come from?

A. This piece comes from the Loucks property, which adjoins Lots 93 and 94. It is representative of halfway down the pit. There are twenty-two feet of hard-pan there, I should say, and this is about halfway down. [79]

Q. Can that be broken up, Mr. Davis?

A. Oh, yes. You can break up any kind of rock. That is essentially a sandstone.

(The sample was offered in evidence as Plaintiff's Exhibit 18.)

WITNESS.—Hard-pan limits the adaptability of the land. It will allow fruit-trees to grow on land like this if it is not too close to the surface, but land of this character where there is so little soil on it will practically eliminate the possibility of the successful commercial production of fruit. About five feet of soil is necessary for the commercial production of fruit. In fact, that is the first requirement of a fruit orchard, to have depth of soil to provide for sufficient area for the feeder roots of the tree. They generally occupy the upper three feet of the soil, the lower roots going into the other strata, affording anchorage, drawing moisture for the tree, and the total amount of soil that is available acts as a suitable reservoir for moisture for the maintenance of the tree generally.

In hard-pan as thick as this it would not be practicable by blasting to open up this soil so that it would drain, because unless you can break through

(Testimony of Herbert C. Davis.)

the hard-pan and form a contact, making an opening that will contact the surface soil with either a similar soil or sand or some loose material underneath to provide drainage, and there is sufficient area for the root, it would be valueless to blast. Of course, this is so thick that it would not be practicable to try to blast through it.

Q. Is it possible that that hard-pan would disintegrate out there, or that the application of water to it would make it slack, or that [80] the application of air would slack it?

A. There are some types of that hard-pan we find them in bunches where it will do that, but the general hard-pan that is there would not slack or go to pieces to any appreciable extent, even if you could expose it to air; but I don't see how you could do that without peeling off all the surface soil, or something of that nature.

Q. Are there places out in that neighborhood where ditches expose the lower part of the hard-pan, or where there are cracks in the soil, there, so that you can observe it?

A. Yes, there are many drainage ditches out through the whole section, and in those places the hard-pan is exposed for a thickness, in some of them, of three or four feet; outside of the natural wearing away which comes from the flowing water, there is no evidence that the hard-pan is decomposed or has fallen to pieces.

Q. In giving your analysis, I understood you to refer to lots 103 and 107: The property seems to

(Testimony of Herbert C. Davis.)

be 102 and 107. You have so shown it on the map. Did you make an analysis of the same soil as is indicated on the map?

A. Yes. That is simply an error in my clerical work if it is noted otherwise.

Cross-examination.

I am nearly thirty years old. I am not a graduate of the University of California. Altogether I attended at the University about three years. I first went to the University in 1916, and stayed there for about a year and a half, and then went into the Army. After going into business in Antelope on the ranch I returned to the University at Davis for short courses in agricultural work over a period of about five years. [81]

It is my opinion that at least five feet of soil is necessary for the successful growing of fruit-trees. I first learned that rule in the school, before going into the Army. After my return from the Army I went into business at Antelope, farming, orcharding. I could not say the total number of acres we operated. We actually owned a hundred and fifty. We farmed as much as a thousand acres there at times. The average depth of soil of the acreage that we operated was about four feet. At the time we made our purchase I knew of the rule of five feet of soil being necessary for the growing of trees. That was the accepted rule at that time but for various reasons it did not particularly affect our purchase there.

(Testimony of Herbert C. Davis.)

I completed the analysis to which I have testified last night. I have been working on it for some time. The strong acid solution test is a standard test, and is used by many chemists for specific purposes. Many authorities on chemistry give that method for the analysis of soil. I don't know that there has been any change among the authorities as to the proper standard or tentative test for analysis.

Q. Didn't you testify in a case of this character a few days ago, in which you so testified.

A. It depends on what you mean by authorities. My understanding is that the authorities generally have not changed.

WITNESS.—The Association of Official Agricultural Chemists is an organization made up of federal and state chemists, whose duty it is to analyze various substances, the sale and manufacture of which is being controlled by law. They recommend certain official methods, standard methods, that apply to various products that would [82] come under state and federal supervision. Other methods they may suggest, and they mark them tentative. At the present time the tentative method recommended by that Association is the so-called fusion method, which determines the total quantity of the plant food in the soil, or in any other substance, such as granite or fertilizer, or in any other material you happen to be working on, without reference, however, to its applying your results essentially to agricultural purposes. I would say that

(Testimony of Herbert C. Davis.)

the time required in making a test of a sample by the fusion method is about the same as would be required by the strong acid soluble method, but not the same equipment, because in one case you digest the soil in glassware, in a water bath with a high temperature, boiling water. In the other case you would fuse the soil in a platinum crucible. That test does not necessarily take more equipment and more expensive equipment. The only difference in the expense of the equipment is that platinum is high priced. We have plenty of platinum ware in our office. More platinum is required by the fusion test than by the acid test. A platinum crucible is required in the fusion test, whereas in the strong acid soluble test you simply use glassware. The strong acid soluble test does not draw from the sample of soil the total content of phosphoric acid and potash. The fusion test does draw from the soil the total content of those two elements.

Redirect Examination.

Q. Why have you selected the acid soluble test in preference to the fusion method?

A. For several reasons. First, I felt that it gives a fairer treatment of the soil, particularly for this purpose, in that it shows that amount of plant food which we could really consider to be [83] plant food in the soil. The fusion method would show the total amount there, whether it was locked up inside the grains of sand, etc. The second reason is that most of the authorities that we would

(Testimony of F. E. Unsworth.)

have occasion to refer to for a comparison of our results with their results base their work on the acid soluble method.

TESTIMONY OF F. E. UNSWORTH, FOR DEFENDANT.

F. E. UNSWORTH, a witness for defendant, testified:

I live in Rio Linda, on the highway this side of the town site of Rio Linda. I own forty acres of land there. I purchased that property last October. It was planted at that time. About three and a half acres are planted to trees, mostly Tuscan peaches. A portion of the orchard is planted on soil of less than five feet. I have soil there where I am growing peach trees, as shallow as thirty inches. The trees are about eight years old. They are still in good, healthy condition and still growing. They have good leafage yet this year on thirty inches of soil. I had a very good crop this year. I got about five lug boxes off one tree, about forty or forty-five pounds to a lug box. I cultivate and irrigate my orchard.

I sold some of my peaches, mostly all locally. I could not sell any to the cannery. There were a great many peaches left on the trees in addition to what I sold. I sold in the neighborhood of a hundred dollars' worth, I should judge. I sold about a ton to one man. A great many came in with

(Testimony of F. E. Unsworth.)

lug boxes and took them away. I have only an approximate estimate of the total number that I sold.

My orchard is very uniform as to the size of the trees. [84] They are all about the same age on that soil where it is of no greater depth than thirty inches. There is some deeper soil on my place. The trees look just as good on the shallow soil as on the deep soil. This is a picture of my orchard. Other plants, such as flowers and climbing vines and ornamental trees and shrubs, do fine.

(The picture was offered in evidence as Defendant's Exhibit 19.)

That ground of mine, speaking particularly of the shallow soil, I consider adapted to the raising of fruit.

I came to Sacramento in the fall of 1889. I have been in different counties around here, but mostly in Sacramento County. I was not an eastern purchaser. I am a local man.

Cross-examination.

I am a meat-cutter by occupation, and was such prior to going out to Rio Linda. The only experience I have had in raising fruit is within the last year, since I have been out there.

I did not say that all of my soil is only thirty inches in depth. It runs from about four feet down to thirty inches. Thirty inches is the shallowest place I have found.

I never raised any fruit prior to coming to Rio

(Testimony of F. E. Unsworth.)

Linda. I have seen lots of it, though. The only fruit I have sold was a hundred dollars' worth.

I did not plant the trees. They were planted about eight years ago. I have sounded in three or four places to find out how deep my soil is. [85]

TESTIMONY OF H. F. BREMER, FOR DEFENDANT.

H. F. BREMER, a witness for defendant, testified:

I live in the locality known as Rio Linda. I first purchased a piece of land there in 1922. At that time I bought eleven and a fraction acres, and engaged in the poultry business, with about two thousand chickens. I improved that place by planting fruit-trees in a family orchard, about fifty trees of different varieties. Where I set the trees out the soil was about two and a half feet deep. At the time I planted them I dug holes on top of the hard-pan, and the following summer, when the ground got dry we had it blasted between the trees. That blasting provided ample drainage so the water did not stand and injure the roots. The trees have made a pretty good growth.

I sold my place after living there about two years, and then I purchased another parcel of land, about half a mile from the place that I first owned, ten acres this time. I am now in the poultry business and have about twenty-five hundred hens without the baby chicks.

(Testimony of H. F. Bremer.)

I pass by the place I formerly owned every time I go*t* to town, and have stopped over there and visited the present owner. I have observed the growth of fruit-trees since I left the place. They have done very well. They grow well and are still alive and are bearing fruit. I saw the crops this year. The size is very good, the quality and flavor very good. That which I have sampled is good.

This is a picture of the place I first owned, and of the trees that I planted.

(The picture was offered in evidence as Defendant's Exhibit 20.) [86]

Cross-examination.

Prior to 1922 when I went out there to this place I had never had any experience in raising fruit. I tended to one set of fifty trees there for a little more than a year. I didn't sell any fruit from those trees. They were too young. In 1925 and '26 I planted twelve trees, and that constitutes my experience as a fruit raiser.

TESTIMONY OF LOUIS TERKELSON, FOR DEFENDANT.

LOUIS TERKELSON, a witness for defendant, testified:

I live out in the Rio Linda district, on the highway this side of the town site, right across the road from Mr. Unsworth, who testified here a few minutes ago. Before coming to Rio Linda I lived in Southern California, where I was engaged in the

(Testimony of Louis Terkelson.)

fruit business. I have been engaged in that business something over thirty years. I bought my property at Rio Linda over fifteen years ago. I have forty acres. A portion of that is planted to fruit-trees. I planted some of my trees in 1914, and some in 1913.

There is a portion of the soil on my place shallower than five feet. I have been investigating that lately and I find I have more of the three feet than I thought I have. I have a considerable quantity of soil that is about three feet deep. Lots of my trees are planted on soil that is as shallow as three feet.

I have about three and a half acres of Bartlett pears on that place. Those trees are about thirteen or fourteen years old. They are still alive. I did not blast for any of my trees when I planted them. They are all planted on top of the hardpan without blasting. The pear trees made a very nice growth. They look well at the present time. They are not dead or dying. [87]

I lost some of my pear trees with blight. That is not a condition of the soil. I have not lost any trees due to the condition of the soil. The blight does not affect upland pear trees nearly as much as on the river bottom lands. There is a great deal of trouble with blight on river bottom lands, and very little on uplands. Pears grown on the upland are better shipping pears than those grown on bottom land. We get a pear as good in size on the upland as the pear on the river bottom, and good color.

(Testimony of Louis Terkelson.)

This year we had a medium crop on account of rain in the blooming season and the bees could not work to pollenize them and the pears did not set so heavy. This year I have sold about 208 boxes of pears, and the shipping houses closed down, and I had about a third of them left on the trees and on the ground. That was due to market conditions. I had a heavy crop two years ago. I shipped about seven hundred boxes, and there were about a third of them left on the trees. The reason I didn't pick that third was due to market conditions.

I consider that the land out there three feet in depth is adapted to the raising of pears, and as a fruit man I consider it adapted to the raising of other fruits.

I have about twenty-four or twenty-five acres of almonds. My almond trees are thirteen or fourteen years old. Part of my almond orchard is planted on land with less than three feet of soil.

I have testified before that the average of my soil would be five feet in depth.

Q. Confining my examination altogether to that portion of your orchard where the soil is about three feet in depth, have your almond trees made a good growth on that soil? [88] A. Yes, they have.

WITNESS.—I did not blast for any of them. They are now thirteen or fourteen years old, and are still alive, and do not show any signs of dying. I have had a good crop from my almond orchard, some years, heavier than others, depending on the

(Testimony of Louis Terkelson.)

season. There was nothing in respect to the failure of the crop due to the conditions of the soil that I know of, nor to the depth of soil.

I am pretty thoroughly familiar with the Rio Linda district. The principal industry throughout the district is poultry.

This is a picture of the almond trees in my orchard. The leaves are off the trees because when we harvest a crop we knock the almonds off with long poles into sheets and the leaves come with them.

Q. Do you consider that soil there of a depth of three feet—never mind the general average of your orchard, but if the soil is of the depth of three feet, do you consider that that is adapted to the commercial raising of fruit?

A. Yes, because I am doing it right now for years.

Q. Can you raise fruit successfully, commercially, and profitably on three feet of soil in that district?

A. I am doing it.

Mr. BUTLER.—We offer this picture in evidence and will pass it around among the jury.

(Defendant's Exhibit 21.)

Cross-examination.

My occupation is fruit raising. I am not engaged in business as a tractor operator. I do not do tractor work for a [89] living. I don't work with my tractor unless a neighbor of mine gets hard pinched, and then I help him out. I do not do

(Testimony of Louis Terkelson.)

considerable work for my neighbors with my tractor. I have done no work with my tractor this past season, except just my neighbor across the road, nobody else.

The principal occupation in Rio Linda is the poultry industry. It is not working for a living at other occupations. You can make a living if you are willing to work and do something. I don't know that most of the people out there have jobs in town here and places of that kind. I don't go around looking at what they are doing. I am too busy on my own place.

Q. Then you don't know whether or not they are engaged in the poultry industry?

A. I see lots of chicken-houses.

Q. And you see lots of vacant ones, too, don't you? A. I don't know about that.

Q. About a third of them are vacant, aren't they?

A. I couldn't tell you that.

TESTIMONY OF JOHN POSEHN, FOR DEFENDANT.

JOHN POSEHN, a witness for defendant, testified:

I live in the Rio Linda Colony, in Subdivision Six. On the 19th of November it will be five years that I have lived there.

My son Robert lives on the place right next to me. He has five acres. We are engaged in the poultry business, separately. Each has his own plant. I

(Testimony of John Poschn.)

have forty fruit-trees planted on my place, where the soil is half a foot, a foot and two feet deep. I have pears, plums, peaches, apricots, figs and cherries, all I need for family orchard. I blasted for every one of the trees [90] when I planted them, and it made drainage, and the water went through well. I lost two trees. It was raining in 1926–27, lots of heavy rain that winter, and it was my fault. I should have drained that water off. That is the reason those two trees died. I planted them again and they grew all right. The trees produce all the fruit I want. I think my fruit-trees grow pretty well on that place.

I planted eight different varieties of grape-vines. The soil is just the same as the other place, from six inches to two feet. My grape-vines have grown pretty well. They are big vines. I planted them in 1925. I have had a crop of grapes off of them. I got sixty pounds from one Thompson Seedless. The next to that one was forty-five pounds. Then I got forty-one pounds from one vine of Malagas. I have my own sugar scale, and I have twenty-two per cent sugar. They are very juicy and nice.

I irrigated two rows on the outside to find out where I could get the most sugar, and I found that where I put no water I got more sugar than where I did put the water. I do not irrigate them. They bear well all through the vineyard.

I planted Robert's trees for him on his place, in the family orchard. The depth of soil is the same, six inches to two feet. I blasted for his trees; a

(Testimony of John Posehn.)

good growth. There is a fig tree there I measured this morning. It is ten feet high and twenty inches around above the ground. I raise all the greens I want for my chickens. I have fifteen hundred chickens. Sudan Grass, alfalfa, China cabbage and barley. They all grow well. I could sell some if anybody wanted it. The vegetables grow well.

My son Robert has some ornamental trees on his place. They seem to grow well on shallow soil. [91]

This is a picture of Robert's place. Where the picture was taken that is on shallow soil there. These trees are thirty feet high and thirty inches around above the ground. They are ornamental trees like the trees around this building here. I planted them in 1924.

This is a picture of my place. I planted some acacia trees here. They are twenty feet high, twenty-five inches around above the ground. I planted those in 1925.

I dug a well pit for myself and one for my son Robert. I found the hard-pan there on the top. It was about an inch or two inches thick. That is hard. Under that it is so soft you can pick it out readily. When I dug my well pit I used dynamite to make headway, to make it go faster.

When I dug that material out of Robert's well pit I spread it out on the ground, and it just melted from the weather. There are no chunks. It falls to pieces. He gets all the vegetables he wants on

(Testimony of John Posehn.)

that ground. I wish I had that on my place. The vegetables grow very well.

(The picture was offered in evidence as Defendant's Exhibit 22.)

Cross-examination.

I sold some fruit this fall, 1,072 pounds of grapes. I never sold any more at any time. The two trees that I spoke of that died, they died in a hole I had blasted. It was my fault. I should have drained the water off. Water gathered there and cause the trees to die. It was from the rain. It was my fault. I should have drained it off.

I do not patronize the fruit and vegetable man who has a large business out there in that fruit district. I have not bought [92] fruit elsewhere because I have all I want, except sometimes in the winter when we have hard rains. I have bought potatoes. I can buy potatoes cheaper than I can raise them.

Q. It is pretty hard to raise anything out there, isn't it?

A. I have my chickens. I take good care of my chickens and I make lots of money.

TESTIMONY OF JAMES GEDDES, FOR DEFENDANT.

JAMES GEDDES, a witness for defendant, testified:

I have lived in Sacramento and around here about thirty-five years. I am pretty familiar with con-

(Testimony of James Geddes.)

ditions in other districts around the city of Sacramento, and have bought and sold land in Sacramento County and elsewhere. For a while I was engaged in the fruit business in Yolo County. I owned a fruit ranch there. I have been with the cannery as outside man for a good many years, buying fruit and getting the right kind of people on the right kind of land to grow stuff for the canneries. My knowledge of the fruit conditions extends over a considerable period, both in growing and buying and otherwise.

I am familiar with the friut district around through Sacramento County and adjoining counties, pretty generally. I know this Rio Linda Colony. I have known it for a good many years. I knew it before it passed out of the hands of the original owners into the first purchasers that subdivided it, and remember when the Rio Linda Colony was carved off from the larger holding. I have watched it from the time of its first development. I am out through that district a great deal. I have owned land in Rio Linda, and bought and sold land in that district. I knew that district in 1922, and before and since. [93]

I have been over the lots belonging to the plaintiff in this case, described as Lots 93, 94, 102 and 107 in Subdivision No. 6, and have looked at them.

Q. What in your opinion was the reasonable market value on an acreage basis of the land in those lots that I have described as of the month of March, 1922?

(Testimony of James Geddes.)

A. There are two ten-acre tracts, or one twenty-acre tract, that faces on a good road. There is improved property close by it. I figure that at three hundred fifty dollars an acre. Then there is another ten-acre tract on a good road at three hundred dollars an acre, and in back of that is another ten-acre tract that does not lie quite as good. It is on a back road, or a side road, you might call it, and that property is worth, or was worth, three hundred dollars. There is a difference in the lay of the land. The land lying along the good road is necessarily of more value than the other.

Q. About how many acres would you say you fix at a valuation of $350 an acre?

A. About thirty acres. There are thirty acres lying on good roads.

The COURT.—Q. You didn't say that. You said a twenty, and a ten, and a ten.

A. That is what I intended to say, your Honor.

Q. All right, if you want to correct it, go ahead.

A. What I intended to testify was, there was thirty acres on a good road, at $350, that is twenty acres at $350, and a ten-acre tract facing on a good road at $350, and another ten acres lying in back that would not be as valuable, at $300 an acre.

Mr. BUTLER.—Q. The two ten-acre tracts facing the road on one side, and one ten-acre tract facing a road on the other, [94] and the other ten acres in back?

A. Yes.

(Testimony of James Geddes.)

WITNESS.—From my knowledge of the fruit business and fruit lands, and the experience I have had in fruit, this land which I have described is adapted to the commercial raising of fruit. I am familiar with hard-pan conditions through the valley. Practically all the eastern shipping fruit land in the Sacramento County and in El Dorado County and in Placer County is on shallow soil. In Sacramento some of it is so shallow that if they happen to miss irrigation one season the orchard dies. That is a well-known fact around Penryn, Newcastle, Auburn. Newcastle, ships more fruit than any other point in California, and the bulk of it is shallow soil. It has to have irrigation. If they don't irrigate it the trees die in one season.

The principal industry I have noticed in the Rio Linda district in the last five or ten years is the poultry business. The presence of hard-pan in itself is no detriment to the raising of fruit where it is properly handled. Sometimes it might be, and other times it might be a benefit. For instance, take the Florin country, where they raise so many Tokay grapes. It is all shallow soil, soil from one to two feet deep. They seldom ever get soil three feet deep. They claim it is a benefit there in the early ripening of the grapes. They ripen early, and they get them on the market early, and get good prices, and there is more sugar in the grapes.

I know the Oroville country. They raise early and high-grade oranges there, and the finest brand

(Testimony of James Geddes.)

of olives in the state. That is shallow hard-pan land. Lots of it is like barren, rocky [95] land that a man would hesitate about buying, but it does produce fruit in commercial quantities and of good quality. Of course, they have to irrigate, and those lands become valuable and available for fruit raising when they are within reach of the irrigating system.

Cross-examination.

I said I bought and sold lands in the Rio Linda district prior to 1922. I bought forty acres across the road from Mr. Turkelson's property. That is on the Rio Linda Boulevard. It was an improved place. I did not put the conveyance on record. It lay in the Valley Trust Bank for about two or three months. I don't know that I bought any property out there of which the conveyance was recorded.

Q. Did you, between the years 1914 and 1925, ever buy any agricultural land in Sacramento County, the conveyance of which was recorded?

A. I had several pieces, small pieces around the city. I cannot recollect now any that was ever put on record. I bought a big ranch about four hundred fifty acres, from White & Terry, near Galt.

Q. What year was that?

A. About 1914 or 1915.

Q. Was the conveyance of that recorded to you?

A. No.

TESTIMONY OF LAMBERT HAGEL, FOR DEFENDANT.

LAMBERT HAGEL, a witness for defendant, testified:

I live in the Rio Linda Colony, a little bit to the east of Mr. Posehn. I do not know where Mr. Nepstad's place is. Mr. Loucks' place is about half a mile from me, and this property is [96] supposed to adjoin somewhere around there. It is in the neighborhood of half a mile from my place.

I own forty acres. I have planted a portion of that to fifty-eight fruit-trees in a family orchard, where I have thirty-six different varieties. The soil in my orchard runs all the way from seven inches to twenty-four inches deep. I blasted where I planted my trees. I find that the blasting permitted the opening up of the subsoil so that I had drainage for my trees in all my holes except one. I blasted in the fall, and then the next spring the water remained in one hole and I blasted that again, and that opened it up so that it drained sufficiently. As a rule I used a stick and a half of powder to a hole. It loosens up around about ten feet wide.

Q. Where that hard-pan and material underneath was thrown out by blasting and laid there all winter, what I want to know is, did it remain in chunks or did it soften up and disintegrate and become soil?

A. There is a strata that runs about an inch and a half. That stuff lays there for quite a while,

(Testimony of Lambert Hagel.)

perhaps for a year. But the rest of it falls apart like powder.

WITNESS.—Even when the water does not get on it, it falls apart. When that stuff slacks I can raise things on it. I raised my lawn on it, and I have a good lawn. It makes very good soil.

I have two nectarine trees on twelve-inch soil. The trunk is six inches thick, and about fifteen feet high. They gave me three lug boxes full of nectarines to the tree. They were very big in size, and good in flavor. [97]

I have sixteen cherry trees, and they run all the way from two and a half to three and a half inches around the trunk, and from twelve to fifteen feet high, except one is less. All the other trees are about the same as the cherry trees.

I lost a tree in 1927 when the general sour sap conditions came through the country. I replanted that tree. It is growing and doing well.

I had a heavy crop off my cherry trees; also, off my apple trees. The rest of the trees have not brought me a heavy crop, but what they have brought is fine, nice, big fruit, good in flavor, but not a heavy crop. The reason for that is they are only young trees. They are only four years old, not in full bearing.

I am in the chicken business. I have fourteen hundred chickens. I raise greens and vegetables, and a lawn and ornamental trees around the place. Everything grows fine. In some places the soil is as shallow as seven or eight inches. In my well

(Testimony of Lambert Hagel.)

it is twelve feet deep. That is the deepest place I ever struck.

I have twenty-eight acres of vineyard. I planted the oldest one in 1925. In December, 1927, and January, 1928, I planted the last ones. I planted about nine acres in the oldest lot, from cuttings. They are about three or three and a half years old now. Last year I had a crop of between four and six tons off nine acres. They were two and a half years old then. This year I have taken off about six and a half tons, and I have not picked them all yet. I pruned them for the shape of the vines, not in the expectation of a crop. I did not expect a heavy crop this year.

I did not blast for my vines. Where my vines are planted it is from six inches up to thirty-two inches deep. The size of the bunches I got, and the quality of the fruit, is just as good as I have seen any place. I do not irrigate my orchard. I cultivate it a lot. [98]

I know the place owned by Mr. Adolph Stern. I have seen it quite frequently. Mr. Stern gave his orchard pretty good care, I believe, the first two years. The third year, not quite so good. Since 1927, and since the general sour sap condition, and also since these trials started, he gives it hardly any care at all. He plows it in the spring and gets it disced by somebody else, but as a rule it is done out of time when the moisture is about all gone out of the ground and it is too late. I believe the reason his orchard looks no better than it

(Testimony of Lambert Hagel.)

does is due to lack of care. I can see no reason why an orchard on his place would not do as well as my orchard.

I think the soil out there in the Rio Linda Colony, particularly within half a mile or a mile of my location, is adapted to the raising of fruit. Considering my own place, I would say it is adapted to commercial fruit-trees and for a commercial vineyard and orchard. It could be grown successfully and handled profitably if they looked after it properly.

This is a picture of one of the vines in my vineyard.

(The picture was offered in evidence as Defendant's Exhibit 22.)

Cross-examination.

I own just one tract in Rio Linda. The legal description of that tract is 39, 41, 42 and 43. Each is ten acres. I own them. I have no deed. I have a contract. We have dealings on it, me and the Fruit Lands Company, but whether it is deeded already to me I don't know. I dealt with a man in Canada. I owe the Suburban Fruit Lands Company three thousand dollars on those four tracts. [99]

Q. On the 17th of May, 1927, did not you and your wife, Margaret Hagel, execute and deliver to the Sacramento Suburban Fruit Lands Company a chattel mortgage covering all of your personal property on that place out there, given to secure the sum of $6,670.75? A. Yes.

(Testimony of Lambert Hagel.)

Q. And that has not been paid, has it, in whole or in part? A. That has not been paid.

Q. And then in addition to that you owe three thousand dollars on the purchase price of the property?

A. No, that is all included. That is all in one.

Q. Yesterday you said that your place was entirely clear.

A. I meant anything that is on my place. That was my meaning.

WITNESS.—I have sold fruit off my place last year and this year. In 1927 I sold between four and six tons of grapes to different parties. I cannot name one person to whom I sold. As a rule they are strange names to me and I don't know them. Some of them I didn't even ask their names. In addition to that, in 1927 I bought raisin grapes, a field. In 1928 I sold about six and a half tons. That is all the fruit I ever sold from my place.

Q. Do you recall having a conversation on the first Monday in December, 1927, at Mr. Kral's place, you and Mr. Kral being present: Do you recall a conversation that you had at that time?

A. We had a conversation several times.

Q. Did you not state to Mr. Kral at that time that Mr. Kral should plant grapes, and not tree fruit?

A. Yes. I said, "Mr. Kral, if I was you I would plant grapes, because the market is better for grapes, and with tree fruits the market is over-

(Testimony of Lambert Hagel.)

flooded, and you cannot make any money out of them." [100] Those are the words I used.

Q. Did you not state to him that tree fruit would not grow on that land, on that Rio Linda shallow hard-pan land? A. No, I did not.

Q. Did you not state to him that as to the price of the land, those that had bought from the company had been cheated?

A. No, nothing of the kind.

Q. Did you not state to him, "You should spend a few dollars planting a few ornamental trees, to make the front of your place look good, and thereafter you should sell it to some easterner who might come along and fall for it"?

A. I said, the words, yes—I said, "Mr. Kral, if you spend $40 to buy some shrubs and ornamental trees, and plant them, and have your place looking decent, and plant all the rest of your land in grapes, so if anybody will come along you can show an income, and you can show some improvements, that is the way you are able to dispose of your property; but as it looks now, the $20,000 you are asking for it, nobody will look at it, because your books will not show any income, and there is nothing nice looking there." Surely, those are the words I told him.

Q. In the latter part of November, 1927, at Mr. Kral's place, again, Mr. and Mrs. Kral present, Mr. and Mrs. Klein present, Mr. and Mrs. Perra present, did you not state to Mrs. Perra that the land in Rio Linda is too shallow to raise tree fruit?

A. No, I did not.

(Testimony of E. E. Amblad.)

ested in, and we went into that and went all over these forty acres and saw the lay of the land, the surface. He took a general inspection there.

During these trips we had a discussion regarding hard-pan. I told him the district was underlaid with hard-pan, as I told him in Minot. There was a well pit across the road to the west of this tract, probably one hundred feet from there, and he was looking in there and saw the hard-pan. I showed him the hard-pan in the well pit. It was an open pit, he could see it.

In our talks in Minot before he came here he mentioned about wanting to get a place in California where he could have all of his children and sons-in-law located with him. I think there were about five in the family, and he wanted enough land for all of them to be together. He intended for all of them to go into the poultry business. He was going to put all of his sons and his sons-in-law, as well as himself, in the poultry business. In Minot he told me a number of times that he was engaged in the real estate business. He told me about owning a farm in Baltimore County, and about an interest in the bank where he had done considerable real estate business, and while he was there he had purchased in the [103] neighborhood of three thousand acres of land in Saskatchewan, and at the time I met him he was operating that, buying and selling, and farming some of it himself. He told me he also controlled or owned a couple of grain elevators.

(Testimony of E. E. Amblad.)

An arrangement was made between me and Mr. Nepstad whereby he was to act as agent for the Sacramento Suburban Fruit Lands Company, under me, in the sale of land. I made that arrangement. While we were negotiating at Minot he told me there were quite a number of people who were interested, and wanted to know if I would pay him a commission, and I agreed to pay him a five per cent commission. As a result of that negotiation he sold three people in Minot, by the name of Olson, MacCressy and Cummings. He also sold his partner, a Mr. Sandley, in Minneapolis, who was interested in his Saskatchewan land. On such sales as he made the company paid him the five per cent commission I had arranged for. I had some correspondence with him at various times.

Q. I show you a letter here purporting to be from yourself, as sales manager, to Mr. Nepstad, dated April 11, 1923, and ask you if that is a carbon copy of a letter which you wrote and sent to him at that time. A. Yes, it is.

Mr. McCUTCHEN.—Before those are offered, may I ask what the purpose of this is, Mr. Butler? Is that just about some of these people he sold to on commission?

Mr. BUTLER.—There are admissions and statements regarding the purpose, here, and there are other things which connect up with the correspondence already in.

(Testimony of E. E. Amblad.)

The COURT.—Admissions in the witness' letter, do you mean?

Mr. BUTLER.—Connected up with the correspondence from the plaintiff, himself. [104]

The COURT.—I am asking you a question. You say there are admissions. Do you mean admissions in the witness' letters?

Mr. BUTLER.—If I made such a statement, your Honor, that was inadvertent, because this witness could not make admissions in letters received from other persons.

Mr. McCUTCHEN.—We object to these as immaterial, irrelevant and incompetent.

The COURT.—Well, the other letters were received; these may go in. You allowed others to go in without objection.

Mr. McCUTCHEN.—No, your Honor, we objected to all the others.

The COURT.—I don't remember that you did. There were some that were excluded.

Mr. BUTLER.—We offer the letter of April 11, 1923.

(Defendant's Exhibit 24.)

Q. Will you examine these other letters and documents? Those are all letters passing between you and the plaintiff, are they?

A. Yes, and one telegram received.

Q. This telegram of June 5 was received from Mr. Nepstad, was it? A. Yes.

Mr. BUTLER.—We offer that.

Mr. McCUTCHEN.—We object to that tele-

(Testimony of E. E. Amblad.)

gram. Nepstad says he does not remember signing it. It is not proved that he signed it. We object to it as immaterial, irrelevant and incompetent, and no foundation laid.

Mr. BUTLER.—Q. It was received from the telegraph company in due course of business, was it?

A. Yes.

Mr. BUTLER.—We offer it.

The COURT.—I don't think the proof is sufficient, unless you have something else, for instance, unless you have an answer to [105] it. Objection sustained.

Mr. BUTLER.—Exception. I offer this one of June 12.

Mr. McCUTCHEN.—The same objection.

The COURT.—Objection sustained.

Mr. BUTLER.—Exception. I offer this one dated June 15, 1922, from Mr. Amblad to Mr. Nepstad.

Mr. McCUTCHEN.—The same objection.

The COURT.—Objection sustained.

Mr. BUTLER.—Exception.

Q. The letter of May 27, 1922, addressed to Mr. Nepstad, a carbon copy, signed by Mr. Amblad, Sales Manager; you mailed this to Mr. Nepstad, did you? A. Yes.

Mr. BUTLER.—I offer this in evidence.

Mr. McCUTCHEN.—Objected to as immaterial, irrelevant and incompetent.

(Testimony of E. E. Amblad.)

The COURT.—Does it show that it is an answer to a letter?

Mr. BUTLER.—This is in answer to a letter from the plaintiff.

The COURT.—You can make a showing that it was properly mailed.

Mr. BUTLER.—Q. This letter was dictated and signed by you, was it?

A. Yes.

Q. And addressed to Mr. Nepstad in an envelope and mailed to him in the United States mail, in due course? A. Yes.

Mr. BUTLER.—I offer it in evidence.

The COURT.—Q. Did you put the postage on it?

A. No. We had an office girl attending to those things, and they went out in due course.

The COURT.—Well, there is a whole lot of loose proof in these cases; this is not any worse than the rest of them, I will allow it. [106]

(Defendant's Exhibit 25.)

Mr. BUTLER.—I offer a letter dated April 13, 1922.

Q. You sent that letter, did you? A. Yes, sir.

Mr. BUTLER.—I offer it in evidence.

The COURT.—Is it a part of the correspondence?

Mr. BUTLER.—It is part of the series of correspondence. These are all letters, your Honor.

The COURT.—Very well. Let it be received.

(Defendant's Exhibit 26.)

(Testimony of E. E. Amblad.)

Mr. BUTLER.—Q. A letter of April 7, 1922, addressed to Mr. Nepstad, saying, "I just received your letter of the 6th," etc. You sent this letter, did you?

A. Yes.

Q. And you followed the usual course in sending it, did you? A. Yes.

Mr. BUTLER.—We offer that.

(Defendant's Exhibit 27.)

Cross-examination.

I did not make it a custom of getting these people I procured as purchasers to get their friends into this deal. This was Mr. Nepstad's suggestion. I did not have some of Mr. Hansen's friends working on him. The three of them came voluntarily. Mr. Nepstad volunteered, too. He came through an advertisement that his son-in-law answered in a Minneapolis paper.

Q. And it was from people that you had already gotten into the deal that you obtained other purchasers from, isn't that true?

A. Not always. In Mr. Nepstad's case he was in business, and after he got connected with us, after he negotiated with us, he suggested that there were some of his neighbors who would like to come out, [107] and that he could sell them.

WITNESS.—Mr. Nepstad did not just give me names of prospective purchasers. He was right there and helped close them. He mentions that in one of his letters, that he worked hard on

(Testimony of E. E. Amblad.)

it. I would come up and help him close the deal. He had been out there on a trip and inspected pieces of land and then came back. He inspected two pieces on that trip, one for Mr. Olson and one for Mr. Cummings, and when he went back there I had him get in touch with these men.

I am in the life insurance business. I am not connected with the Suburban Fruit Lands Company. I severed my connection with that company several months ago. I don't know anything about the Rio Linda Poultry Farms, Inc. I am not connected with that concern.

The COURT.—Q. You were agent for the company, were you, selling on commission, I suppose?

A. I was sales manager, working on a salary and commission.

Q. Could you sign contracts?

A. No, I could not.

Q. Neither could the plaintiff, for what you say he sold?

A. We would take applications, and they were submitted. He could do the same thing as I could. They were submitted to the company for execution by the officers of the company.

Q. You hired him, did you? A. Yes.

Q. And paid him some part of your commission?

A. Yes.

Redirect Examination.

Mr. BUTLER.—Q. Did you pay him part of your commission?

(Testimony of E. E. Amblad.)

A. I misunderstood that question. The company paid that; they [108] confirmed the arrangement I made with him.

The COURT.—Q. You got your regular commission?

A. Yes.

Q. Just the same? A. Yes.

Mr. BUTLER.—Q. Were you operating on a commission, or on a salary?

A. A combination.

TESTIMONY OF ARTHUR MORLEY, FOR DEFENDANT.

ARTHUR MORLEY, a witness for defendant, testified:

I live in the Arcade district, about a mile south of the Rio Linda Colony. I have lived there about eight years. I am engaged in fruit growing, in which business I have been for about seventeen years in California, and during that time I have had general experience in fruit raising in the Sacramento Valley, both on river bottom lands and uplands. I have been employed by fruit raisers who farmed on river bottom lands, and have also worked considerably on uplands.

I have seventeen acres in my property. It is all planted. When I purchased that property most of the trees were planted. The house improvements were not there. Where the trees are growing on my property the depth of soil runs from around

(Testimony of Arthur Morley.)

a foot or eighteen inches to three feet. The ground is blasted. I grow mostly plums, pears, peaches, apricots and cherries, mostly shipping fruit. My trees are now about ten years old. They are alive and in good healthy condition. I have never heard of any rule among practical fruit growers or horticulturists requiring a minimum depth of five feet of soil necessary to the successful growing of fruit-trees commercially. No such rule is in general practice among orchardists in California. There are thousands of acres in Sacramento and in Placer County of less depth. [109]

The production on my orchard has been very good every year I have been there. I usually ship in the neighborhood of a thousand crates of plums a year. Then I have apricots, pears and cherries. I usually have a good crop of peaches, but this year I did not have very many. The blooms did not set. Roughly speaking, I should think that from six or seven acres of plums I shipped about a thousand crates. There were quite a lot left. They were Number 1 quality, shipped under the Blue Anchor Label of the California Fruit Exchange.

I know of orchards in my vicinity that are planted on shallow ground, John Robinson, the Bradley Ranch, George Fletcher, Harold Molford, *Missble.* There are quite a number around Arcade and Carmichael on hard-pan land. I am familiar with those orchards. The depth of soil on those places is just about the same as on mine. Blasted.

(Testimony of Arthur Morley.)

The growth of trees has been very good; good healthy orchards.

I know the property that formerly belonged to Mr. Walton Holmes. That is about a quarter of a mile away from my home. That is blasted shallow ground. The growth made by the trees there has been good. I know the Harry Wanzer orchard; a good growth there; blasted. I know the orchard of Doctor June B. Harris; a good growth there. Generally speaking, they all had good crops this year, and fruit of good quality and good flavor. The almonds were a little light, but the fruits were all good. That was a general condition, so far as the almond crop was concerned, this year. The almond trees have produced very good crops in other years.

I am familiar with hard-pan lands in other districts, in Oroville and Sutter County and Florin and different places. It is a fact that fruit is being grown successfully and commercially in those districts on hard-pan land of a shallow depth. In Oroville [110] they raise an extensive olive crop and oranges and peaches of early maturity and good size and flavor. In Florin they raise a superior quality of table grapes on shallow land. One of the best that leaves the state, they claim, comes from Florin.

As to the difference between river land and uplands, it is generally conceded that the upland fruit is better for shipping. It is firmer and has more sugar content, and they carry better. Practically all

(Testimony of Arthur Morley.)

of the peaches, apricots and plums that are shipped come from the uplands. Bartlett pear trees have a greater resistance to blight on uplands than in the river bottom lands. I think shallow hard-pan lands, when blasted and properly prepared and cared for, are generally adapted to the raising of fruit commercially. I have found it so on mine.

I have been all over the Rio Linda district recently. I spent thirty days, more or less, in making a survey there. I found there were fruit-trees and vines growing in the Rio Linda district. Where they were cared for properly we found, generally speaking, that the trees were growing nicely and thriving, and had crops on them. We also found trees that had not been cared for, and of course they were not doing so well. I made a count of fruit-trees and vines in the district.

Q. Let us have your figures.

A. We found that there were almonds 18,720; olives, 9,370; peaches, 7,060; plums, 2,950; pears, 8,875; prunes, 6,040; figs, 10,230; apricots, 1,550; walnuts, 490; cherries, 9,465; persimmons, 100.

Q. Now, as to the grape-vines?

A. Grape-vines, we found 97,650.

Q. Now, will you give the totals?

A. Then we found in the family orchards, we figured about 325 [111] family orchards, approximately 25 trees to each, and that would make another 8,100. And about 10 vines to the orchard, which would make 3,250 more. That makes a total of three 91,750, vines 100,900.

(Testimony of Arthur Morley.)

WITNESS.—Where those had been cared for, generally speaking, they were in a healthy and productive condition. I am familiar with the depth of soil and hard-pan in Rio Linda. It is just about the same as that in the Arcade district. In my opinion, fruit can be grown successfully and commercially in the Rio Linda district.

I made an investigation to determine whether or not root growth would penetrate into the hard-pan. I excavated by a plum tree and some olive trees. We dug down about four feet by the plum tree, and found the feeding roots were extending through the substratum of soil, and found the same with respect to the olive trees.

These pictures represent conditions about the base of the olive trees.

(The pictures were offered in evidence as Defendant's Exhibit 28.)

Cross-examination.

I was in the Rio Linda district with Mr. Jarvis. He is a man who has lived around there for a good many years. I guess you would call him a horticultural expert; previously, a Farm Adviser in this county. We were employed by this company to make a survey of that land. While we were there we investigated some commercial orchards. We were on quite a lot of them. I did not inquire about the profits. We just wished to see whether the trees were bearing and what shape they were

(Testimony of Arthur Morley.)

in. I did not know before I went there that there were no profitable orchards there. [112]

We took these pictures of the olive trees on the Smith place. I would not say that that is an abandoned olive orchard. Mr. Smith was not there. The trees were not stunted. They showed a light crop, like all olive trees this year. I don't think like those trees would be any year. They were not scrubby looking. The pictures do not show scrubby trees.

The reason we selected the olive tree to excavate under was that we heard that had been blasted, and we wanted to test a tree that had been blasted.

I think that soil of a depth of nineteen inches is sufficient for raising fruit profitably and commercially if it is blasted. I have seen it done. Twenty-three inches is sufficient, if it is properly cared for and worked. Hard-pan lands are just as good as river bottom lands for raising of certain varieties of fruit.

TESTIMONY OF F. E. TWINING, FOR DEFENDANT.

F. E. TWINING, a witness for defendant, testified:

I am an agricultural chemist, and have been engaged in that work in California for twenty-eight years. My headquarters are in Fresno. I have had occasion to examine soils and soil conditions through the Sacramento and San Joaquin Valleys

(Testimony of F. E. Twining.)

quite extensively. I find plenty of hard-pan, thousands of acres, in the Fresno district. It is pretty well noted for hard-pan in some sections. I find fruit growing on thousands of acres of hard-pan in Fresno, and deciduous fruits growing on shallow soil of a foot and a half, two feet and three feet, on the hard-pan area in Fresno County.

In shallow soils most of it is blasted. The trees do well and make a good progress and good growth on hard-pan land where [113] it has been blasted. Lots of orchards are being raised commercially in the Fresno district on that type of land.

Fresno is generally noted as a grape-growing district, for raisin and table grapes, which are raised on shallow soil and hard-pan land, there in thousands of acres, and of good quality and flavor and profitable vineyards.

I know of no rule among horticulturists requiring five feet of soil as necessary to the growing of fruit-trees. I have never run across anything in my work or *or* my studies that will limit the life of a tree according to the depth of the soil.

I am acquainted with the Florin district. That is a grape-growing district on shallow hard-pan land. They raise and ship out of the Florin district a large quantity of the finest table grapes that are grown. In that district they raise grapes commercially on hard-pan land.

I am acquainted with the Oroville district, and have made investigations there. They raise fruit

(Testimony of F. E. Twining.)

on shallow hard-pan land near Oroville in large quantities, olives, oranges, and other fruits. Also, in Sutter County, in the peach district.

I have been over the Rio Linda district. I have made between three hundred and four hundred borings and tests there, generally over the entire district. I am familiar with hard-pan there, its depth and thickness of strata, and the subsoil. There is no reason, in my opinion, why fruit cannot be grown successfully, commercially and profitably in the Rio Linda district, as well as in these other districts. The soil, its quality and character in the Rio Linda district, is adapted to the commercial raising of fruit, as well as the soils in Fresno, Florin and the Oroville district. They are the same type of soil. There is lots of shallow soil in all of those districts, and they raise all [114] kinds of crops.

I have examined and made tests of soil on lots 93, 94, 102 and 107, the Nepstad property.

Q. What are your findings as to phosphoric acid and potash?

A. Lots 93 and 94, composite sample: Phosphoric acid .17, or 6,800 pounds per acre-foot; potash .98, or 39,200 pounds per acre-foot. On lots 102 and 107, phosphoric acid .22 or 8,800 pounds per acre-foot; potash .9, or 36,000 pounds per acre-foot.

Q. Is the quantity of phosphoric acid and potash as found by you in those soils sufficient to support plant life, or the growth of trees, extending over

(Testimony of F. E. Twining.)

that period of time that you would expect necessary in the growth of a commercial orchard?

A. Yes, there is a good content of those two elements.

Q. How much is used in a year on an orchard in an acre?

A. Phosphoric acid, 25 to 50 pounds; potash 50 to 100 pounds.

Q. So that this would last several hundred years, would it? A. Yes.

WITNESS.—In making my analysis I used the fusion method, estimating the total amount present in the soil. There is no other method in use other than the fusion method of determining the total amount which will give any indication of the relative or approximate amount available in the soil for the use of plants.

We sometimes make a short cut, taking the amount that is soluble in strong acids. If we find that there is a large quantity soluble in acid we know there is sufficient in the soil and it is not necessary to go further, although it depends on the combination rather than the actual amount. That method does not take the time that it does to estimate the total amount present, and it does not [115] get the result. The results will vary. The only method in use by the Association of Agricultural Chemists is the fusion method. The acid soluble method was used previous to twenty-five years ago.

(Testimony of F. E. Twining.)

I am a member of probably thirty or forty chemical societies. The American Association of Official Agricultural Chemists are those chemists connected with the Government, the Bureau of Chemistry, Experimental Stations. That is exclusively an association of chemists who are in Government work. Those are the official methods used by them, and the only ones recognized by the Government. There is no official method recognized by any such Association of nonofficial chemists. There are no publications issued recognizing any official method, except that one particular association.

I investigated the thickness of the hard-pan that I found on this particular land. The first hard-pan was, I think, about two inches thick. Then came a gray stratum which was much softer, varying from an inch or two to some four or five inches.

Q. This first layer of hard-pan, two inches thick, with reference to the impervious character of that, will it permit water to pass through it as it stands in place?

A. The first hard-pan is the most dense and is usually covered with a thin layer of hard dense substance which is not pervious. But the hard-pan under that will absorb moisture readily.

WITNESS.—This material is what I call the chalky material underneath. It is hard because it is dry. It is similar to the top soil, which, when it is dry, is hard and dense. This underlayer of material will absorb water. In proportion to its own volume [116] it will absorb from one-half

(Testimony of F. E. Twining.)

to almost its entire volume. When it becomes wet it will crumble and disintegrate and become soil, the top layer, as well as the rest. It will take the top layer longer. If the top impervious layer is shattered by dynamite, it will permit the passage of water so there will be sufficient drainage for the tree. It will also absorb moisture for the use of the plant.

There is no reason that I know of why this ground cannot be prepared by proper treatment, blasting, etc., for the planting of fruit-trees and growing fruit. It is adapted to the raising of fruit.

The hard-pan that is introduced here is practically the same material, and will soften with water and exposure to the air. The amount of powder required in blasting, considering the depth and thickness of the hard-pan in order to prepare a hole for planting, will vary in different places. I have done blasting on harder surfaces that cost twelve cents a hole. I think that here it might average twenty dollars to thirty dollars an acre at Rio Linda. I think that would be a reasonable cost. Some people dig out a lot of the stuff after it is blasted, but I don't think that is necessary. You can plant in the hole immediately after blasting.

Cross-examination.

This soil is not very hard to handle, as compared with other types. It depends on what you want to compare it with. It is what we term a heavy soil, which requires handling at the proper time because

(Testimony of F. E. Twining.)

of moisture conditions. Depth of soil is a very important consideration. Shallow soil bakes quickly in the summer. It is limited to a great extent for farming purposes. Any very shallow soil will not hold sufficient water for the plant, and [117] sandy soil is worse than heavy soil. This soil out here is not as poor soil as can be found in the county. It is some of the best in the county. Some of that soil is the best type in California. As to the conditions involved in this particular case, the soil is shallow and it must be opened up.

Q. Summarizing your testimony, then, it is that if that is broken up and pulverized and drainage provided for the trees, the trees would grow there. Is that what you mean?

A. No. I mean that when you blast that so that the water will go down in the subsoil, it will be all right. If the water stands on top it is not good. Therefore, that is the reason you crack it up.

WITNESS.—My opinion is that if you crack it up and provide drainage fruit can be raised on it.

The method followed by me in the testing of this soil is what we call the fusion method. Where it is necessary, and we want to know exactly what there is there, we do it that way. There are times when we use the acid method, when it is not necessary to determine the actual amount present. I understand the acid soluble method was the method Mr. Davis followed. It is not an official method. I would say it is an antiquated method. It was established twenty-five years ago.

(Testimony of F. E. Twining.)

Q. And is not recommended or referred to in any of the standard text-books of the day?

A. I don't say it is not referred to. It is referred to.

Q. It is not recommended in the standard text-books of to-day?

A. It is not an official method. It is a short cut method that is used where it is not necessary to go further. [118]

WITNESS.—I did not say yesterday that all of the later authorities left that out of their work. You took a small text-book of a few hundred pages. Such a book that size cannot give all of this stuff. The book you had yesterday was a general work on quantative analysis. Wyley's book on Soils is about four times as large as that one and is only on soils.

I mentioned Scott yesterday. I had in mind the last edition, which has just been recently issued. I am not sure about the last edition, being copyrighted in 1925, but there have been several editions published. I think there has been one since the 1925 edition. I have a copy, but not with me. I would not say for sure that it is since 1925. I don't try to keep those things in my mind. I don't think it is necessary.

I did not say when I testified yesterday that Scott had left out this acid soluble method from his book. I said I didn't know for sure whether he did. I said that Scott was one of the up-to-date books, and

(Testimony of F. E. Twining.)

I think he gives the official method, but he may refer to the other one, too, so far as I know.

Q. I am handing you here a volume entitled "Standard Methods of Chemical Analysis" by Scott. Is this the volume to which you referred yesterday as being the book out of which that was left?

A. I did not say it was left out of this. You asked me and I said I didn't know, I would not say it was left out of this.

The COURT.—Q. Is that the book you had reference to?

A. This is one of Scott's books, yes.

Mr. LEWIS.—Q. Do you find in there—

The COURT.—Don't set him to hunting all through that book. If you have anything to show him, show it to him. [119]

Mr. LEWIS.—I have the page turned down, there, your Honor.

A. He simply gives one method here of making a solution of soil. We use that method for indicating lime, magnesia—

Q. That is the method he gives at page 404?

A. I would have to look at the method for potash and phosphoric acid.

The COURT.—Well, we are not going to wait for him to hunt through this book. If you have anything to read to him and to put before this jury, do so, without putting him to guessing at something.

Mr. LEWIS.—This is the volume that the witness identified, your Honor.

(Testimony of F. E. Twining.)

The COURT.—There is a way of presenting these matters. You ought to know it by this time.

Mr. LEWIS.—Q. Is not this the acid soluble method, and I am reading to you from page 404 of Scott's work, "Standard Methods of Chemical Analysis":

"Procedure for Soils. Digest 10 grams of moisture-free soil with 100 cc. of hydrochloric acid of a constant boiling point (sp.gr.1.115) in a 300–cc Erlenmeyer flask fitted with a ground-glass or rubber stopper and a reflux condenser. Digest continuously for ten hours on the steam bath, shaking the flask every hour. After settling, decant the solution into a porcelain dish. Wash the insoluble residue onto a filter with hot water, and continue the washing until free from chlorides, adding the washings to the original solution for evaporation. Oxidize the organic matter present in the solution with a few drops of nitric acid and evaporate to dryness on a water bath. Moisten with hydrochloric acid and dissolve in hot water and evaporate a second time to complete dryness and until the excess of hydrochloric acid [120] is completely removed. Moisten the cooled residue with strong hydrochloric acid and dissolve in hot water. Filter into a 250–cc. graduated flask, wash free from chlorides, and dilute to the mark. Use an aliquot of 100 cc. for the determination of the alkalies." Is not that the acid soluble method?

A. We use that method for indicating silicon, iron, aluminum, lime, magnesia.

(Testimony of F. E. Twining.)

Q. Is that not used for the purpose of estimating potash?

A. Of acid soluble potash and phosphoric, yes, but only the acid soluble portion.

Q. And that is the method used by Mr. Davis in his analysis?

A. He says he used 40 grams. That makes some difference.

Mr. LEWIS.—That is all.

TESTIMONY OF N. H. NEPSTAD, IN HIS OWN BEHALF (RECALLED IN REBUTTAL).

N. H. NEPSTAD, plaintiff, recalled in rebuttal, testified:

In 1922 I did not have any connection with any bank. I did not tell Mr. Amblad that I had. I did not own two grain elevators. I had a half interest in one grain elevator. I did not tell Mr. Amblad I owned two grain elevators.

Cross-examination.

I told him I had a half interest in an elevator. I did not tell him I was a stockholder in some bank.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFF (RECALLED IN REBUTTAL).

HERBERT C. DAVIS, a witness for plaintiff, recalled in rebuttal, testified:

I used a forty-gram sample of this soil. That

(Testimony of Herbert C. Davis.)

does not make any difference in the result. I used forty grams, because there is too much chance of error, and we increase the quantity to handle them properly. Forty grams is something over an ounce. [121]

The cost of blasting in the Antelope section is from sixty to seventy-five cents per hole, with eighty to a hundred holes to the acre, depending on the way the trees are planted.

I know about the grape crop in the Florin district. They are having a great deal of difficulty down there to get the grapes colored in time to ship them. Of course, when they don't color, the sugar content does not come up. The investigations point to the shallow lands and the presence of clay in those soils and not enough drainage as the reason.

Cross-examination.

I never did any blasting in Rio Linda Colony, but I did right adjacent to it.

TESTIMONY OF IDA E. PERRA, FOR PLAINTIFF (IN REBUTTAL).

IDA E. PERRA, a witness for plaintiff, in rebuttal, testified:

I live in Rio Linda. I know Lambert Hagel. I had a conversation there at Mr. Kral's house with Mr. Hagel in October, 1927. Mr. and Mrs. Klein were there, and my husband and I were there, and Mr. and Mrs. Kral were there. At that time Mr.

(Testimony of Ida E. Perra.)

Hagel told us that the lands in Rio Linda were too shallow to raise tree fruit and that it was foolish to plant tree fruit on that land and expect it to grow. He told us he made wine out of his grapes, and he said that the prohibition officers had chased him. I am sure he was not talking about somebody else. He said it was himself.

Cross-examination.

My husband and I are plaintiffs in a lawsuit of this same character in this court, and have been and are contributors to a general fund for the maintenance of these actions. [122]

Redirect Examination.

My suit has already been tried.

TESTIMONY OF JOHN V. KRAL, FOR PLAINTIFF (IN REBUTTAL).

JOHN V. KRAL, a witness for plaintiff, in rebuttal, testified:

I live in the Rio Linda section, close to Lambert Hagel. I know Lambert Hagel. I had a conversation with him on the first Monday in December, 1927. At that time and place he told me that tree fruits would not grow on the Rio Linda shallow hard-pan lands. He told me that the price the company sold the land for, those who bought from the company had been cheated. He advised me to spend a few dollars to improve the front of my

(Testimony of John V. Kral.)

place, make it look good so I could sell it to some easterner who might come along.

Cross-examination.

I am a plaintiff in a lawsuit of the same character pending in this court, and am a contributor to the general fund for the maintenance of those actions.

Mr. McCUTCHEN.—That is the plaintiff's case.

Mr. BUTLER.—I desire to move at this time that the Court instruct the jury to render a verdict in favor of the defendant on the following grounds:

(1) That the evidence is insufficient to show that defendant deceived or defrauded plaintiffs in the making of the contract referred to in plaintiff's complaint for the purchase by plaintiff from defendant of land or either of said contracts.

(2) That the evidence is insufficient to show that defendant misrepresented the quality or character of the land [123] purchased by plaintiff from defendant, or the value thereof.

(3) That the evidence is insufficient to show that the plaintiff has been damaged by any act on the part of defendant.

(4) That the evidence shows affirmatively that plaintiff's cause of action is barred by the provisions of Section 338, and of Subdivision 4 thereof, of the Code of Civil Procedure of the State of California, and that the evidence is insufficient to show that plaintiff's cause of action is not barred

by said above-quoted provisions of said section of said Code.

The COURT.—The Court is of the opinion that the evidence is sufficient to go to the jury, and to sustain a verdict for the plaintiff, and that the suit is in time, providing the jury finds that the greater weight of the evidence is with the plaintiff. Motion denied.

Mr. BUTLER.—Exception.

Before the Court's charge to the jury, defendant requested the following instructions:

DEFENDANT'S INSTRUCTION No. 1.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiff must show that the fraud occurred within three years of the commencement of their action for relief, or if this action was commenced more than three years after the fraud occurred, then he must show, in order to maintain his suit, that he did not discover he had been defrauded until a date within three years of the time he commenced his action.

With regard to this discovery of the fact constituting the alleged fraud, you are instructed that the plaintiff will be [124] presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your ver-

dict must be in favor of the defendant, unless the plaintiff has proven by a preponderance of the evidence both that he did not discover the alleged fraud within the period of three years before he filed his action, and that he could not have discovered it by the exercise of reasonable diligence, three years before he commenced his suit. He was not permitted to remain inactive after the transaction was completed, but it was his duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to him. He is not excused from the making of such discovery even if the plaintiff in such action remains silent. A claim by the plaintiff of ignorance at one time of the alleged fraud, and of knowledge at a time within three years of the commencement of his action, is not sufficient, a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiff contracted with defendant to buy land. Plaintiff commenced his action on the 28th day of February, 1928; their contract with the defendant for the purchase of its land was made in September, 1922. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiff in the making of this contract, then before you can find a verdict in

his favor, you must also believe from a preponderance of the [125] evidence that he neither knew of the fraud, nor could, with reasonable diligence, have discovered the fraud before a date three years prior to the commencement of his action, that is, before the 28th day of February, 1925. If you believe from a preponderance of the evidence that plaintiff either knew of the fact constituting the alleged fraud before February 28, 1925, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant."

"DEFENDANT'S INSTRUCTION No. 2.

You are further instructed upon the matter of plaintiff's discovery of the alleged fraud that if plaintiff discovered that a material representation concerning the land he bought was false, then he was at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring his action within three years of the discovery of the falsity of any material representation concerning the land."

"DEFENDANT'S INSTRUCTION No. 3.

You are instructed that plaintiff cannot recover in this action unless he was deceived by the alleged representations, for if the means of knowledge are at hand, equally available to all parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to

say that he has been deceived, unless he was induced by trick or misrepresentation of defendant not to make such inspection." [126]

"DEFENDANT'S INSTRUCTION No. 4.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation."

"DEFENDANT'S INSTRUCTION No. 5.

You are instructed that if the plaintiff discovered, or by the exercise of reasonable diligence could have discovered the falsity of the alleged representations as to value of the land he bought more than three years before he commenced his action, then your verdict must be for the defendant." [126½]

CHARGE TO THE JURY.

The COURT. (Orally.)—Gentlemen of the Jury: You have heard the evidence and the arguments in this case, and now it is for the Court to deliver to you its instructions. These are mainly to make you acquainted with the law that applies to the case, and in the light of which you will determine the facts. You take the law from the Court. When it comes to determining the facts, what witness to believe, what weight to give to his testimony,

what inferences to draw from the circumstances that appear to surround the case, that is exclusively your function. The Court has no right to tell you what conclusion of fact you will arrive at. It has the right to tell you the law, and you accept the law from the Court, but we accept the findings of fact from you, as disclosed by your verdict.

In this case, the plaintiff has brought his action against the defendant, alleging that in 1922 he bought some forty acres of land out at Rio Linda from this defendant, and eventually paid for it $14,000, or $350 an acre. The plaintiff alleges that he was induced to make that purchase by false representations by the defendant made to him. The defendant admits the sale and the purchase of the land, and the payment of the money, so far as this case is concerned, but denies that it made any false representations, or that they at all influenced the plaintiff in his purchase of the land.

In this action, the plaintiff must prove his case before he is entitled to recover anything, if he is entitled to recover, at all. And when I say that he must prove his case, and that by the greater weight of the evidence, it simply means that after all the evidence has been submitted to you and you are considering it all, if you find that the greater weight of it proves the vital elements [127] of plaintiff's case, then he is entitled to a verdict. If the greater weight of the evidence is not with the plaintiff, then the defendant is entitled to the verdict. If there is anything in the defendant's evidence that helps the plaintiff's side of the case, he is entitled to the

benefit of it; and if there is anything in the plaintiff's evidence that helps the defendant's side of the case, the defendant is entitled to the benefit of it. In other words, no matter which side has placed the evidence before you, when you scan it and consider it as to which of it you will believe, you determine where is the greater weight of it. If the evidence is equally balanced, the defendant is entitled to your verdict. If it weighs heavier for the defendant, the defendant is entitled to your verdict; if it weighs heavier for the plaintiff, the plaintiff is entitled to your verdict.

In deciding where the greater weight of the evidence is, that involves your judgment as to the credibility of the witnesses, how much weight you will give to their evidence, what inferences you will draw from the circumstances that surround the case. The Court may express an opinion on the credibility of a witness, and what is proven, and the weight of the evidence, but if it does, it is not in the expectation that it will bind you to its opinion, but it sometimes does it in the hope that it may aid you to arrive at a correct conclusion of the case. You determine the credibility of witnesses, just the same as you determine the credibility of men with whom you deal in your daily lives. You all take some pride, I suppose, in your knowledge of human nature, and, in your dealings with your fellow men, you do not, as the saying is, allow them "to put over anything on you." In just the same way, you determine the credibility of the witnesses. You observe their demeanor, you observe their attitude,

whether frank, open, and fair, or whether [128] inclined to deceive, to conceal, to exaggerate, or to distort; whether they seem to be really trying to give you a full knowledge of the facts, for that is the only office of a witness, to tell you all the facts, or whether they seem to be endeavoring to deceive, or mislead you, or conceal the truth and the facts from you.

You take note of the interest of a witness, in so far as he has any. The plaintiff, of course, is largely interested in this case. He has as large an interest as the defendant. While he speaks for himself, the defendant speaks, of course, only by its witnesses, including whatever experts it may have placed upon the stand. I do not remember that it put any of its officers on the stand to testify before you.

You also take into consideration whether a witness has heretofore made statements which conflict with what he says here on the witness-stand. If a man is given to making different statements elsewhere, it may seriously detract from what he swears to here on the witness-stand. There is some of that in this case. You take into consideration whether he contradicts the witnesses whom you might prefer to believe. Whenever the witnesses contradict each other, it is for you to determine where the truth lies between them. You also take into consideration whether he is contradicted by the circumstances. It is an old saying in the law that witnesses may testify falsely, whereas circumstances may point unerringly to the truth. Very often you

find that to be the case. Whether it is so to any extent in this case is a matter for you.

There is a rule of law that witnesses are presumed to speak the truth. The jury may give them the benefit of that presumption, unless you see reason to believe they are not entitled to [129] it, reason in their interest, their demeanor, in their conflict with other witnesses, or the circumstances, or anything that goes to aid you in arriving at a determination as to just how far a witness is credible.

There is also a rule of law that a witness who has testified falsely in any particular before you, if you believe that, you ought to disbelieve all the balance of that witness' testimony, and, if your judgment approves, you may reject it all.

There is also another maxim of law that if evidence of a fact is presented which the other party has ability to deny and does not, you take that into consideration in determining whether the fact is not proven.

You must remember that you are not obliged to find that anything is so just merely because a witness swears that it is so. You can very readily see that, because when they contradict each other you cannot believe both of them. It is for you to test every statement of a witness by what is reasonable, what is probable in the light of the circumstances, and determine whether you will believe him. And that is equally true of experts. The mere fact that an expert pronounces it as his opinion that a thing is thus or so, or any statement of his, you are not

obliged to accept it as Bible truth simply because an expert swears to it.

An expert is one who is assumed, or presents himself before you as having special knowledge of some subject which is not open to the average man without some special study. He assumes, then, to tell us about it, and to express his opinion with respect to it. In so far as you believe he has the requisite learning and knowledge, and is honest in expressing himself, you respect his opinion and his testimony, but you only give it such weight as you think it is entitled to in the light of the whole case. [130]

Where two witnesses flatly contradict each other, and there is some of that in this case, you can see that neither of them can be presumed to speak the truth, and so on the other considerations you determine which of them speaks the truth, and how far, and the weight to give to such testimony.

Those, Gentlemen of the Jury, are the rules by which you will arrive at a determination as to the witnesses to believe, and how far, and what weight to give to the testimony and the circumstances.

Now, coming to what must appear proved before the plaintiff can be entitled to recover, and that is the issue in this case, is plaintiff entitled to recover in this action? Before he is entitled to recover, there are various elements of his case which must appear to be proven by the greater weight of the evidence, all of them, or the verdict must, of necessity, be for the defendant. We will take them up step by step, and I think you will have them better in mind, and it will make it clearer to you.

First, as to the representations. The plaintiff alleges, in substance, and the parties have tried the case on that theory, that it was represented to him before he purchased this land that it was well adapted to commercial orcharding, and was worth not only the price, but was worth $350 an acre or more. Defendant denies that those representations were made. Now, does it appear by the greater weight of the evidence that they, or either of them, were made? If either of them was made, the plaintiff's case, so far, is made out, and we will go to the next step.

Coming now to the first representation, Was it represented to him that the land was adapted to commercial orcharding? In the first place, the defendant's advertising says so. Remember that the defendant, a corporation, speaks by the mouth of its agents, [131] and by its advertising. The book is its agent, just as much as Mr. Amblad was its agent, who testified on the stand. So if it represented that in its book, or through Mr. Amblad, the defendant is liable for it and is responsible for it. And, as counsel freely stated, they stand for it, provided it is proven. If any one of you sent out an agent to do business for you, you would be bound by his statements and by his representations, and if he falsifies you can be held to account for it, and to make it good if what he represented was within the scope of his employment. So we find in the book the advertising that came to the plaintiff before he purchased, that the land is represented as adapted to commercial orcharding. Indeed, the

book goes so far as to say in what is assumed to be a letter that it is proven beyond doubt to be adapted to the commercial raising of deciduous fruit—apples, pears, plums, apricots, and the like. Deciduous fruits are the tree fruits whereof the trees lose their leaves every year—cherries, peaches, and the like. The mere fact that it appears in the book in the form of a letter—and it appears in other places also, not in letters—does not relieve the defendant from responsibility. Whatever it prints in that book it says, no matter in what form it is, whether in the statement of a letter, or assumed to be an endorsement by a number of citizens, or the like, the defendant is responsible. The plaintiff testifies that Amblad also told him that same thing, —that Amblad represented to him that this land was well adapted to commercial orcharding, for all kinds of fruit grown in California. He showed him pictures of orchards, and said the land was rich and fertile, you can plant grapes between the trees and the grapes will pay for the land before the trees come into bearing, and then you can grub the grape-vines out if you want to and rely on the orchard. That is what the plaintiff testified that Mr. Amblad told him. Mr. [132] Amblad took the witness-stand, but he did not deny that. Mr. Amblad did not say anything about that.

So you see you have it in the book, you have it in the testimony of the plaintiff, that Mr. Amblad also said so, and there is no denial by Mr. Amblad, or of what is in the book, so that representation must be taken to be proven, Gentlemen of the Jury,

and there cannot be any other reasonable conclusion, in the light of the evidence.

Now, as to the representation that the land was $350 an acre. The book praises the land very highly. Of course, there is nothing wrong in that. Anyone has a right to praise his land; he has a right to fix any price on it he sees fit; but when he goes beyond that and says it is worth so much, its value is so much, when he says that to one who is not in an equally favorable situation to know the truth, then he becomes liable for it if it is false. The plaintiff testifies that Mr. Amblad did tell him that the land was worth $350 an acre, and would be worth $400 an acre, the price would be raised soon. A mere prophecy as to the future would amount to nothing. Plaintiff said that Amblad told him the price was $350 an acre, and it was worth that. Now, again, Mr. Amblad, on the witness-stand, did not deny that. So, ask yourselves if there is any reason, considering that it was easy for the defendant to deny it if it had not been made, they had the witness here, and the plaintiff says that that representation was made, and he did not deny it. So you ask yourselves why shouldn't you accept the plaintiff's statement that that representation was made, and is so proven.

Then you proceed to the next step. It must appear by the greater weight of the evidence that one or the other, or both, of those representations was false. If one is proven by the greater [133] weight of the evidence to be false, that is enough to carry plaintiff's case forward beyond that point.

Now, that is the big issue in the case, Gentlemen of the Jury, were those representations, or either of them, false? You have heard the evidence in respect to this land, its character, its location, what appears in the neighborhood around it, what men have done or tried to do, the result, the evidence of experts in respect to adaptability of the land.

The plaintiff presents several witnesses who have testified before you that they have tried to grow trees out on Rio Linda, on land like this. It is practically agreed that all these lands in that section are fairly uniform—perhaps a little local variations, but fairly uniform with respect to the soil content and the hard-pan which lies underneath. These witnesses for the plaintiff testify that they have planted trees for a few years, and the trees grew all right, and that then they began to die, grow unthrifty, stunted, and have died, and they impute that to the presence of the hard-pan which cuts off the penetration of the roots below.

Mr. Stern said he noticed the difference in the growth of trees in due proportion to the shallowness of the soil; in some places his fig trees were a foot and a half high, in other places up to eight or nine feet, and that those looked fairly good yet.

Then the plaintiff presents Mr. Davis, who comes before you as an expert. He says he is an agricultural specialist. How much he is entitled to the name of expert is always a matter for the jury in respect to any expert. He testified where he acquired his learning and knowledge, and his practical experience. He says that in your university

he was taught by the authorities that *five soil* is necessary as a minimum for commercial orcharding. He said he tried it out after he left school, that he went out into the Antelope section, which adjoins these lands, he and his family and [134] others had a large acreage in commercial orchards, 100 acres in trees, the soil being three or four feet in depth only over the hard-pan. He says that in spite of his learning he tried that out. Of course, you all know the old saying, we learn by experience. He seems to have paid for it, if you take his statement for it. He says it did not do well; he says the trees looked all right, but that they would not produce fruit, and in the seven years they lost $47,000. That certainly does not spell anything but a great failure on 100 acres. He says it was because of the shallowness of the soil.

He says that the soil on plaintiff's land is only nineteen and twenty-three inches deep, and that underneath that is hard-pan of many feet in depth. I think he said twenty to thirty feet, exposed in the well pits adjacent to plaintiff's land, well pits sunk through this hard-pan. The top is very hard and impervious to water. And in that the defendant's expert agrees. And under that Mr. Davis says it is still hard-pan, that it is agriculturally the same; it may be a little softer, but it affords the same impediment to the growth of trees. Mr. Davis says that if hard-pan is only a couple of feet thick it is practical to blast it with dynamite and break it up, and afford drainage to the tree, and also

afford a reservoir for moisture, and the tree will flourish. He says that cannot be done here. The hard-pan is too thick, he says; it is not practicable He says that where the soil is thus shallow there is not sufficient food for the tree, no room for anchorage, no room for the roots to spread, no proper reservoir for moisture, and no drainage. He says that if you blast on this hard-pan it will form pot-holes where the water will gather, and there will be no drainage, and it will drown out the roots of the tree, and bring about their death. [135]

Mr. Davis further tells you that he has analyzed the soil on plaintiff's land, and it lacks very much of the vital elements, particularly potash and phosphoric acid, necessary to the growth of vegetables, and particularly of fruit.

Mr. Davis says that this land is far short of what is requisite, it has about a third of that to be found in medium or what you would call poor land; he says it should have three times as much, in order to make it appropriate for commercial orcharding.

Now, the defendant resists that, and presents its evidence to the contrary. It brings a number of witnesses from Rio Linda who planted more or less trees, and they tell you that their trees have done well. You must look at the length of time they have been planted. Time is a large element in this matter. We all know that on a shallow soil a tree might flourish for a little while, and in later years it would not flourish at all and would die. It would depend, to a considerable extent, on the depth of the soil. I think the defendant's own

witnesses agree on that, because they tell you they must get depth by blasting, that the hard-pan is within two or three feet of the surface of the earth; you can blast and get depth that way, they say. Mr. Davis, apparently, is nearly right when he says that depth is necessary. These witnesses testify to growing trees for some years on Rio Linda, say they flourish, produce good crops. They have told you what their product was, how extensive, the number of trees, how much they made, and the like. It is for you to weigh their testimony, the same as that for the plaintiff, and determine where the truth lies between them. They say they have not observed any trees die because of shallowness of soil. One of the defendant's witnesses, perhaps the one with the largest experience, Mr. Terkelson, who has been there for some [136] twelve or fifteen years, he did finally tell you that his soil averaged five feet in depth. He says he has done pretty well, as much as a thousand crates of plums for one year, for several years, I think he said, off a certain acreage. Just how much it cost to produce them, or how much the profit was, we don't know.

A commercial orchard is not to be tested out by one year of a great crop, or by one year of a failure. No. The same as in your business, you do not determine whether your business is a good business by the fact that you made a whole lot of money one year, and that you didn't make any money in another year. A commercial orchard might be said to be one which, with reasonable care

and diligence, will produce crops of such reasonable size that through the period of years over which the orchard should live, with the average markets that are likely to prevail, will make a profit on the whole enterprise. The book says that a commercial orchard does not begin to produce commercially for five or seven years after it is planted. It takes time to test it out. So that for all those years there is a great deal of care and a great deal of expense. Eventually, when it does begin to bear, it must not only liquidate that expense, but also for the series of years it must show a profit, and also during the time it reasonably ought to live. Mr. Davis says the trees will not live long enough on these shallow soils to accomplish that, namely, a fair return on your investment for the time your land is devoted to that particular orchard. That is the same in your business, Gentlemen. Your business is not commercially profitable unless through the series of years you operate it it liquidates all the overhead and pays taxes, and expenses, and something besides.

So that in weighing the testimony of the witnesses, both [137] for the plaintiff and the defendant, you take into consideration how much they know about it. Is their experience on the land long enough to be worth anything? Does it indicate anything with reference to the adaptability of the land to commercial orcharding?

The defendant also produced a witness who spoke of adjacent lands, Mr. Morley, from Arcade. He spoke of orchards belonging to Wanzer, Holmes,

and the like. He does not assume to state how many years he has known them, just exactly what the production was, what the expenses were, or whether it was long enough to afford any enlightenment to you, or, finally, whether the cost of production was less than the return, or just what the situation was. Perhaps, however, it affords you some opportunity to determine the truth. Just what weight it is entitled to is a matter for your judgment. You give it such weight as you think it is entitled to. Wherever it gives you enlightenment, attach whatever weight to it you think it is worth accordingly.

Then the defendant presents its expert, Mr. Twining. To some extent he agrees with Mr. Davis. He says it is necessary on these shallow Rio Linda lands to blast—that is, if they are not five feet deep; if they are two or three feet deep he would blast. He does not say so, but that is the fair inference, that they must have depth. Mr. Davis put it at a minimum of five feet.

The defendant produced photographs of blasting which they say was done in an olive orchard, where Mr. Morley said the roots had gone down four or five feet. Mr. Twining says the hard-pan makes soil, that when you get below the top hard surface it is like the top soil, and when broken up by blasting it is as good as the top soil, and gives the same opportunity to trees. So what is that other than saying that five feet is advisable, if not necessary, as Mr. Davis says? [138]

Mr. Twining further says that this hard-pan is

only hard-pan is only hard on the surface, two or three inches from the surface, and below that it is soft again. He brings a sample here. He says that air and moisture will slack that and break it up, and it will become soil, and that the roots will penetrate it, and the moisture will go down, and it will preserve the tree. Mr. Davis says no, my experience shows that that will not disintegrate. He mentions to you that on this Rio Linda land, where ditches are cut four feet deep, there is no disintegration there, that the hard-pan stands to-day just as it was originally, and that it has been exposed both to air and moisture. No one has denied that. Some witnesses for defendant say they have thrown out some of this hard-pan and that it does disintegrate, it does become soil, that they have grown lawns on it, and even vegetables. Mr. Twining says this can be blasted through, that it is not deep like Mr. Davis says. It is for you to determine where the truth lies. It does appear from the testimony of other witnesses that well pits eighteen or twenty feet deep are still in hard-pan, and that some stand there without cementing, while others have cemented their well pits. I think Posehn said you can pick it out, if you take it slowly enough, but that he blasted his, going down some eighteen feet.

Now, the witnesses for the plaintiff have testified that the land is not adapted to commercial orcharding; the witnesses for the defendant have testified that in their opinion it is. So there is the conflict,

and it is for you to determine in the light of the whole case.

Mr. Twining further says that he finds more of the vital elements, potash and phosphoric acid, in the land, than Mr. Davis found. Both make a chemical analysis. Now, Gentlemen, that is a [139] matter that is as accurate, or should be as accurate, as the determination of a mathematical problem. Both may be honest. Both say they took samples. Yet they differ from one to six, seven, and eight times. Mr. Davis found only a sixth, a seventh, or an eighth of what Mr. Twining found. Mr. Twining says he found that much more. It may be imputed to a different way of analyzing it. Mr. Davis says he analyzed it to determine what was reasonably available for plant foods. Some of these vital elements may be so locked up in the ground that the plant cannot use them, and they are not available to it. It is just the same with human beings. You may have plenty of nutrition in your bodies, but for one reason or another it would not be available to you.

Mr. Davis says that that is the situation in reference to some of these elements—rock and the like. Mr. Twining, on the other hand, took his sample and determined how much was in the ground all told, whether available or not, although I think he says that over a course of years it will be available. Probably if given long enough nature will disintegrate it. Nature grinds down mountains, and makes soil of them. It is a question of time. Mr. Twining says it will be done in a reason-

able time. It is a matter for your judgment, Gentlemen, to say which one you will believe. Mr. Twining does say, if I remember right, that his method of analysis should show all that is in the ground, and not so very much more than the method used by Mr. Davis. Mr. Twining says that method was used not so long ago. When he was confronted with the authorities as to the method in use here he says, "Yes, that is the way it is done, that is the method."

Now, taking into consideration all of the evidence, what I have related to you, and all the rest of it—and it will all be within your recollection, and remember that if the Court has erred [140] in its recollection in any of this testimony you must remember that your recollection controls as to what the evidence is; you ask yourselves whether, by the greater weight of that evidence, it is proven that the land is not adapted to commercial orcharding. If you find the greater weight of the evidence sustains that statement, that the land is not adapted to commercial orcharding, then the plaintiff's case is so far made out.

Now, as to the value of the land. That, again, is an issue. What was its value in 1922 when the plaintiff bought it? You have heard all the evidence. You have some idea of values, regardless of what experts say. You are local men. All of us acquire knowledge of values, city and suburban, in the course of time. We know the general situation throughout the country. We know what

makes for value. You make up your mind, you consider all the evidence in respect to it.

Mr. Kerr, for the plaintiffs, some twenty years in the real estate business, says it is only worth $50 and $75 an acre, if I remember rightly; he says half of it is worth $75 and half $50, which would make it an average of $62.50 an acre.

Mr. Geddes, says three of the ten-acre tracts are worth $350 an acre, and one of them is worth three hundred—let me see just what he says; two of them worth $300, and two at $350. He would average it at $325 an acre. He says it is well adapted to commercial orcharding. If it is not, that will make a material difference in his estimate. He takes the view that it is. It is for you to determine what was the value of that land in the light of all the evidence before you.

If either of those representations are thus made out by the greater weight of the evidence, you proceed to the next step, and [141] that is, it must appear that these representations were false, and that the defendant knew they were false, or one of them, or should have known it, or made the assertions or the representations in a positive fashion in the face of which the Court will not hear it deny that it knew the truth. The defendant had been dealing with these lands for some ten years at the time it sold to the plaintiff. I think its book says it sold its first tract out here in 1912. It had experts in its employ. Why was it it put it out to the world that this land was adapted to commercial orcharding, if it did not know whether it was

or not? Would it not be at fault there? The law would say so. It was open to it to know. It had ten years to find it out, not only by experiments on the land in the neighborhood, but it had its experts to tell us what it was adapted to, and the nature and extent of the hard-pan, and what it would be likely to do to the growth of trees on a commercial orchard. It made the assertions positively. It states in its advertising book that it is proven beyond doubt; and when you say a thing is proven beyond doubt that implies a test, that it has been tested and demonstrated. If they make a positive assertion of that sort and it is not true, they are just as responsible as if they knew it was false. That is the law. Did it know that the land was not worth $350 an acre? Should it have known it? Value means the reasonable market value that prevails for like lands in that locality. The price that someone pays who is not compelled to buy, but who would buy the land, and from someone who was not compelled to sell but who would sell. If it was not worth $350 did defendant know it? If it did not know it, why shouldn't it know it, having its experts, and dealing with the land for eight or ten years before it sold to the plaintiff? [142]

So if you find by the greater weight of the evidence that the defendant made this positive assertion as to the adaptability of the land to commercial orcharding, which it did, or knew that the value was not $350 an acre, or should have known it, the plaintiff's case is so far made out.

Then you come to the next step: Did the defendant make those representations with the intent that plaintiff would believe them, rely on them, and be induced to buy the land? Well, the whole case is nothing more or less than a common-sense proposition, Gentlemen of the Jury, and this is one of the clearest parts of it. What does a man advertise for but to persuade his prospects to believe what he advertises, and to rely on it, and to act on it, and to come in and buy? There should be no hesitancy on your part over that. Undoubtedly the defendant intended its advertising to be believed, and to influence the prospect, and to induce him to enter into a bargain with him to buy the land. Finding that made out by the greater weight of the evidence, if you do, then plaintiff's case is so far made out, and you proceed to the next step: did the plaintiff believe those representations, did they influence him, in whole or in part, did he rely upon them in whole or in part or was thereby induced to buy the lands, which otherwise he would not have bought? Of course, if regardless of those representations in the book, and by Amblad, in so far as Amblad made them, plaintiff would have purchased the land, then, of course, the representations are immaterial, they cut no figure, because if you will buy regardless of the representations, if they did not influence you, you cannot say you were damaged by them.

What is the situation in respect to that? Plaintiff was a Minnesotan, if I remember right. He fell in with Amblad, down [143] in North Da-

kota, and discussed this land. First he had the book. He had never been to California. I am taking his statement for it. He says he did not know anything about California lands, fruit lands, or what they were adapted to, or the manner of raising California fruits, commercially or otherwise. He says he did believe Amblad, and he believed the book. Ask yourselves why he shouldn't. Why shouldn't he believe them and act upon them? He entered into a contract after they had been made to him, and turned over some property right in the beginning to the defendant. He signed what is called an application. He made an offer to buy the land for $14,000, provided the defendant would accept the offer. Eventually, the defendant did accept it. That is the form it took, an offer, and the other party accepted it. I do not remember when it was accepted, but so far as plaintiff knew it was not accepted until after he had been out in this country. After the plaintiff discussed the matter with Amblad and read the book, he said he came to California to look at the land. He talked to Amblad, and listened to his reports with respect to the property, and when he came to Sacramento he found Amblad right at the depot. Amblad took him along. Was that for the purpose of making sure of him, and seeing to it that he did not fall into the hands of somebody else? Ask yourselves that question. Amblad took him around for four days. Plaintiff says they were on this land only once. He did not see anything wrong with it. They made a casual inspection. Amblad says they

just walked over it and made a surface inspection. Amblad says, I think, they were on the land three or four times. He viewed your city here—which was attractive, of course, and the orchards up in Carmichael and elsewhere, and showed him what his own land would probably arrive at in the course of time, the [144] plaintiff says. For what other purpose would a real estate man take a prospect out to other sections to show him growing orchards? The plaintiff says Amblad told him his land would be like that when it was planted sufficiently long with fruit for commercial purposes.

There is a rule of law, Gentlemen, which is this: If the party does not rely on the representations made to him, but relies upon what he says, sees upon the land, and if he discovers the truth in his inspection, then, of course, he cannot say he relied on representations. But you must remember that the plaintiff was dealing with experts, and that he was not an expert on California lands and fruit lands; whether the vital elements were in the soil, as you look at it, is not obvious by a surface inspection, which he and Amblad said only was made. Apparently it is a matter of dispute to-day between experts whether that land is fertile, and whether it is adapted to commercial orcharding. The law does not require him to employ experts. You can presume that he knew what a man of his experience would know, by going out and looking at the land, like he and Amblad says the plaintiff did. The mere view would not expose how much hardpan was under the ground, or the depth of the

hard-pan. Whether it would tell the average man that it would defeat commercial orcharding is a matter that you will determine. He says he did not see the hard-pan. Nobody says it was visible on the land at that time. He says he was not told anything about hard-pan while out on the land. He says he did not see the hard-pan, and knew nothing about it, though Amblad did tell him, he says, that there was a thin crust of hard-pan, which breaks easily, and is good for the soil. The plaintiff says he saw in the book that there was hard-pan. The book says the hard-pan is hard clay. Davis says it is sandstone. The samples are before you, and submitted to [145] your inspection, in determining whether the book was fair in calling it hard clay, or whether it is stone. I think Mr. Twining did not characterize it, except that perhaps by inference he agreed with the book, because he said it would slack by air and moisture.

Having inspected the land thus far, a surface inspection, to see the lay-out, as Amblad said, and plaintiff said—plaintiff says he was there once, Amblad says several times—the plaintiff went east. Then he wrote to the defendant, "Let the bargain go through. I found more than I expected." What does that indicate to you? What would a reasonable person infer—that he found out that the land was not worth $350 an acre? That he found out that it was not adapted to commercial orcharding? If he had found out those things, would he have likely went on with the bargain and paid $14,000 for the 40 acres? You may see in

those letters the extent of plaintiff's inspection, and whether he did discover anything to show him that those representations were false. The *brain* was made. He did buy. Later on he came out. After that he served as agent, to some extent, under Amblad, and was offering the lands. He is entitled to the same presumption that any man is, that he intended to act fairly and honestly with his prospective customers. Ask yourselves if he had been deceived whether he would not have made clamor earlier to get his money back, and whether he would have likely gone out and endeavored to sell those lands as a sub-agent for Mr. Amblad. Those letters, again, may indicate to you that he still was ignorant that the representations made to him were false. Whether you will take it as such is a matter for you. Take a common-sense [146] view of it, put yourselves in the same position, and ask yourselves what you would likely have done under like and similar circumstances.

So, if he relied on those representations, in whole or in part, and if his inspection, alone, as he gave it, did not undeceive him, then he is entitled to recover in this action, provided he was damaged. That is the next step. It must appear by the greater weight of the evidence that he was damaged. And that brings you right back to the value of the land. Of course, if the land was worth $350 an acre, that is all he paid for it, he did not lose anything, he got his *quid pro quo,* dollar for dollar; the law does not allow any damage simply because he had been misled by false representations,

if he got as much as he gave. He says he did not. If you find by the greater weight of the evidence that the land was worth less than $350 an acre, you give the plaintiff the difference between what he paid for it and what the land was worth. Just by way of illustration, I will give you some figures: If you find that the land was worth $100 an acre, he is entitled to recover $250 an acre for the forty acres, and it is your duty to give it to him. If you find that the land was worth $200 an acre, he is entitled to recover $150 an acre for the 40 acres, and it is your duty to give it to him. When you do that, you take nothing from the defendant that it is entitled to keep. If the defendant got something for nothing, it is only justice that it restore it, and it is your duty to compel it to restore it, provided you find the plaintiff's case is proven, as I have stated to you, and you find he is damaged.

But that is not quite all of the case, Gentlemen. [147] The next step is, did he bring his suit in time? The law is that a person who has been defrauded, as plaintiff alleges he was in this case, must bring his suit within three years after he discovers the fact. Of course, if he is defrauded he is deceived, he is in ignorance. The law says the moment that that ignorance is dispelled and you discover you have been deceived, you must bring your suit within three years thereof or you cannot sue at all. That is the policy of the law. The reason for that is so that lawsuits will not hang in the air eternally. And that policy of the law, Gentlemen, must be upheld, if this is a case where the

facts show that it should be upheld. If the plaintiff was defrauded, he was defrauded when he purchased the land in 1922. He brought his suit on February 29, 1928. So you see the three years within which he could bring his suit commenced to run on March 1, 1925. If he had found out before March 1, 1925, that these representations, or either of them, was false, if he found it out before March 1, 1925, he brought his suit too late, and he is not entitled to recover, and it is your duty to return a verdict in favor of the defendant, no matter how much he was deceived or defrauded. So, if he found the fact out before March 1, 1925, he brought his suit too late, and he cannot recover here. Did he find it out? It must appear by the greater weight of the evidence that he did not. Again, you take into consideration all the circumstances—his experience, whatever it was, and his ignorance of California lands, in fruit lands—whatever it was. You take into consideration the fact that he came here in 1922, he came in July, 1922, but he never lived on the land, never did any work on it, never opened it up. The [148] inference is he rested confidently on the representations that had been made to him, and that induced him to buy, and, of course, what he saw casually in the neighborhood. He lived in town all the time, worked at the carpentering trade, here. There is no dispute about that. I don't remember that he said that he worked at the carpentering trade back east. Perhaps he did. Whether he has not been frank with you with respect to his vocation is a

matter for your consideration, and the weight of it is for you. He says he heard nothing about the land, no one told him it was not worth so much money, no one told him it was not adapted to commercial orcharding, and he did not know. As I said before, it does not seem to be an easy thing to determine, because, even to-day, the defendant insists these representations were true, and the experts differ. It is for you to determine whether they were or were not true. So, was this plaintiff bound to know? Did he know? If he could have known by the inspection of the land, that put him on notice, if that had given him sufficient information that the ordinary man would discover the truth from that, then he would be bound. If he could have thus found out before March 1, 1925, if he saw enough to put him on inquiry—and, again, you put yourselves in the same position—then he was bound to pursue the inquiry, to find out whatever it would have disclosed. Would it have disclosed to him that the land was not adapted to commercial orcharding, or that the land was not worth $350 an acre? He is not bound to accept casual observation as true, even if he heard of it. He says he did not. He was not bound to employ an expert. The experts still differ. You are to determine the truth between them. But it appears that on March 14, 1925, he [149] did write to Amblad, stating, "My boys say they cannot grow fruit successfully there."

They had not tried it out. That was the boys'

opinion. Whether they knew anything about it, we don't know. They were Minnesotans, too.

Then it says, "A neighbor planted a vineyard which dried out." This is the exact language: "Our neighbor put in twenty acres of grapes and they dried out"—not "died out," as it was read to you, but "dried out." I think that is the way it was read to you, although I may have been mistaken in hearing it read. And then there is something said about the grasshoppers having gotten in there. Well, does that indicate that he did know, or had sufficient knowledge to know on March 14, 1925, when that letter was written? And from that, will you infer backwards that he knew it before March 1, 1925, or, rather, has he proven by the greater weight of the evidence that he did not know before March 1, 1925, that these representations were false, that the land was not well adapted to commercial orcharding, and was not worth $350 an acre? Unless you find by the greater weight of the evidence that he did not know it, that is, if you find by the greater weight of the evidence that he did not know it before that time, then you will find for him. That is the whole case, Gentlemen of the Jury. If you find that the vital elements of the plaintiff's case in these various steps, as I have detailed them to you, have been made out by the greater weight of the evidence, you will return a verdict for the plaintiff. If you do not find that they have been made out by the greater weight of the evidence, you will return a verdict for the defendant.

When you have retired to the jury-room you will select [150] one of your number foreman and proceed to arrive at a verdict. It takes twelve to agree upon a verdict.

Any exceptions for the plaintiff?

Mr. McCUTCHEN.—None.

The COURT.—For the defendant?

Mr. BUTLER.—We except to the instruction of the Court on the subject of representations claimed to have been made by defendant to plaintiff, both as to the growing of fruit, and as to the value of the land.

We except to the instructions of the Court upon the subject of the falsity of the representations.

We except to the instructions of the Court upon the subject of the knowledge of the falsity thereof on the part of the defendant.

We except to the instructions of the Court on the subject of the defendant's intent to deceive the plaintiff.

We except to the Court's instruction regarding the definition of a commercial orchard.

We except to the instruction regarding the belief by plaintiff of the representation, and reliance thereon.

We also except to the instruction regarding the date of discovery of any alleged false representation.

We except to the failure of the Court to give de-

fendant's proposed instruction No. 1, on the matter of the statute of limitations.

We except to the failure of the Court to give defendant's proposed instruction No. 2, concerning the effect of discovery by plaintiffs of the falsity of the material representations.

We except to the failure of the Court to give defendant's [151] proposed instruction No. 4, concerning distinctions between representations and matters of opinion.

We except to the failure of the Court to give defendant's proposed instruction No. 5, concerning the effect of plaintiff having been able, by reasonable diligence, to discover the alleged falsity of the representation as to value.

We except to the Court's instruction that the defendant in its booklet, represented plaintiff's land to be well adapted to the growth of deciduous fruit commercially, and also to the Court's instruction that the statement in defendant's literature applied to the land purchased by plaintiff.

(Thereupon the jury retired to deliberate upon a verdict, and subsequently returned into court and rendered a verdict in favor of plaintiff and against the defendant, and assessed the damages in the sum of $7,000.) [152]

Defendant proposes the foregoing as its bill of exceptions on appeal from the judgment in said

cause, and prays that it be allowed and settled as such.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant.

Dated: November 28, 1928.

STIPULATION FOR SETTLEMENT OF BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions may be settled as corrected.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiffs.
J. W. S. BUTLER,
Of BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant. [153]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions do not appear in the record of said cause, I, ————, Judge of the District Court, upon the stipulation of the parties, have settled and signed the said bill, and have ordered that the same be made a part of the record of the said cause, this 27th day of December, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 29, 1928. [154]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND COST BOND.

On the filing of defendant of a petition for appeal, with assignment of errors, and on motion of defendant, by its attorneys, IT IS HEREBY ORDERED:

That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered herein be, and the same is hereby, allowed.

AND IT IS FURTHER ORDERED that upon the giving by defendant of a good and sufficient bond, in the sum of Fourteen Thousand ($14,000.00) Dollars, and conditioned as required by law and the rules of this court, all further proceedings in the said court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals or by the Supreme Court of the United States, upon a petition for writ of certiorari.

IT IS FURTHER ORDERED that the amount of cost bond on said appeal be, and it hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned as required by law and the rules of this court.

The supersedeas and cost bond may be embraced in one document.

A. F. ST. SURE,
United States District Judge.

Dated: Dec. 5, 1928. [155]

Service hereof is hereby admitted and receipt of copy acknowledged this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 7, 1928. [156]

[Title of Court and Cause.]

SUPERSEDEAS BOND AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Sacramento Suburban Fruit Lands Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, and authorized under the laws of the State of California and the above-entitled District to act as sole surety on undertakings of this character, as surety, are held and firmly bound unto N. H. Nepstad, the above-entitled plaintiff, in the full and just sum of Fourteen Thousand Two Hundred Fifty ($14,250.00) Dollars, to be paid to the said N. H. Nepstad, his attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of December, 1928.

WHEREAS, lately at a District Court of the United States [157] for the Northern District of California, Northern Division, Second Division thereof, in a suit pending in said court between said N. H. Nepstad, as plaintiff, and Sacramento Suburban Fruit Lands Company, as defendant, a judgment was rendered against the said Sacramento Suburban Fruit Lands Company in the sum of Seven Thousand ($7,000.00) Dollars, and in the further sum of costs amounting to $38.15, and the defendant having been allowed an appeal from the judgment to the United States Circuit Court of Appeals for the Ninth Circuit; and the Court having made an order for supersedeas, staying all proceedings in the District Court pending final determination of said appeal, provided the defendant give a bond in the sum of Fourteen Thousand ($14,000.00) Dollars, conditioned according to law; and the Court having fixed the amount of cost bond on said appeal in the sum of Two Hundred Fifty ($250.00) Dollars, and the Court having ordered that the supersedeas bond and bond for costs might be combined and embraced in one document,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Sacramento Suburban Fruit Lands Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

AND IT IS FURTHER EXPRESSLY AGREED by said surety that in case of a breach

of any condition hereof the above-entitled court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the action in which this bond is given to ascertain the amount which said surety is bound to pay on account of such breach, and to render judgment therefor against it and to award execution therefor. [158]

IN WITNESS WHEREOF, said principal and surety have executed this undertaking, attesting such execution by their respective seals, all on this the 8th day of December, 1928.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation.

[Seal] By A. E. WEST.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation.

[Seal] By J. W. S. BUTLER, Attorney-in-fact.

State of California,
County of Sacramento,—ss.

On this 8th day of December, 1928, before me, a notary public in and for the county of Sacramento, State of California, personally appeared J. W. S. Butler, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Standard Accident Insurance Company, and he acknowledged to me that he subscribed the name of Standard Accident Insurance

Company thereto, as principal, and his own name as the attorney-in-fact.

[Seal] GERALD M. DESMOND,
Notary Public in and for the County of Sacramento, State of California.

Form of bond and sufficiency of sureties approved.

Dated: Dec. 11, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 12, 1928. [159]

[Title of Court and Cause.]

ORDER TRANSMITTING EXHIBITS.

It appearing to the Court that the exhibits of plaintiff and defendant except the perishable exhibits and samples of hard-pan, should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit in their original form,—

IT IS HEREBY ORDERED that said exhibits, except the perishable exhibits and samples of hard-pan, be transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit in original form, with the bill of exceptions, and need not be printed as part of the record herein.

Dated: January 14th, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 14, 1929. [160]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare a record on appeal containing true copies of the following papers in the above-entitled action:

1. Order removing said cause from the Superior Court of the State of California to the District Court of the United States.
2. Complaint.
3. Demurrer to complaint.
4. Order overruling demurrer.
5. Answer.
6. Minutes of trial.
7. Verdict of the jury.
8. Judgment.
9. Petition for appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Order allowing appeal.
13. Citation.
14. Supersedeas and cost bond.
15. Order transmitting exhibits.
16. Praecipe for transcript.

17. Amended complaint.
18. Demurrer to amended complaint.
19. Order overruling demurrer to amended complaint.

J. W. S. BUTLER,
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant. [161]

Service hereof is hereby admitted and receipt of copy acknowledged this 22 day of January, 1929.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 22, 1929. [162]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 162 pages, numbered from 1 to 162, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of N. H. Nepstad, vs. Sacramento Suburban Fruit Lands Co., No. 476—Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Sixty-nine and 35/100 ($69.35) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 1st day of Feb., A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [163]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to N. H. Nepstad, Appellee, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Sacramento Suburban Fruit Lands Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in

the said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated: This 5th day of December, A. D. 1928.

A. F. ST. SURE,
United States District Judge.

Due service of within citation is hereby admitted this 7th day of December, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Appellee.

Citation on Appeal. Filed Dec. 7, 1928. [164]

[Endorsed]: No. 5706. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Suburban Fruit Lands Company, a Corporation, Appellant, vs. N. H. Nepstad, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed February 2, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5706

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),

Appellant,

vs.

N. H. NEPSTAD,

Appellee.

BRIEF FOR APPELLANT.

BUTLER, VAN DYKE & DESMOND,
Capital National Bank Building, Sacramento,

EDWARD P. KELLY,
Metropolitan Bank Building, Minneapolis,

Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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No. 5706

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),

Appellant,

vs.

N. H. NEPSTAD,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This action is one to recover damage for alleged fraud and deceit in the sale to appellee of forty acres of land near Sacramento City in what is known as the Rio Linda district. Action was begun February 29, 1928, and the complaint alleges, in substance, as follows:

That prior to the purchase of these lands, appellee resided in North Dakota, was unfamiliar with California farm and fruit lands, and entirely relied upon statements and representations of appellant in respect thereto; that appellant fraudulently stated concerning these lands that all of the tracts of land in the County of Sacramento, California, were of the fair and reasonable market value of three hundred fifty ($350.00) dollars per acre and upwards; that the soil thereof

was rich and fertile, capable of producing all sorts of farm crops and products, entirely free from all conditions or things injurious or harmful to the growth of fruit trees, perfectly adapted to the raising of deciduous fruits of all kinds in commercial quantities, producing large crops thereof of the finest quality; that appellee came to California prior to his purchase for the purpose of inspecting the land, was shown casually over it by appellant, and while here was shown adjoining districts, it being stated to him that the Rio Linda lands compared favorably with those of the adjoining districts, and was adapted to the same uses; that on March 24, 1922, appellee contracted to purchase four contiguous lots of ten acres each, and on September 12, 1922, made an amended contract of purchase, excluding two of the lots first covered, and including two others, to make up the full forty acres; that the representations as to quality and value were false; that the land was not worth over fifty ($50.00) dollars per acre, one-seventh of what he had paid therefor, and was totally unfitted to fruit culture, being underlaid with hardpan and clay. Damages in the sum of seventeen thousand ($17,000.00) dollars was asked.

The complaint was demurred to, the demurrer, among other things, presenting the question of the statute of limitations. Thereupon the complaint was amended. By this amendment appellee sought to allege facts bringing himself within the statute of limitations, and touching upon his discovery of the alleged fraud. Therein he says he came to California in July of 1922, and resided in the City of Sacra-

mento, which is about ten miles from the property he had purchased; that he has never lived upon the land; that the adjoining lands were sold to persons residing in portions of the United States outside of California, unfamiliar, as was appellee, with the value of California lands and the adaptability thereof to fruit culture, and that it was generally believed in the locality of the land up to February, 1927, that the statements made appellee in respect of these lands were true; that appellee never had the land appraised, nor offered it for sale, and did not hear from anyone that it was not worth three hundred fifty ($350.00) dollars per acre, or not rich and fertile fruit land; that in 1927 purchasers of adjoining lands complained before the Real Estate Commissioner of the State of California that they had been defrauded in the sale of their lands to them, but that appellee made no particular inquiry concerning the matter; that the complaints were dismissed, and appellant then stated to appellee that his land was worth the amount he had paid for it, and was good fruit land; that appellee's actual discovery was brought about by a further discussion of the facts concerning said land with other settlers in said locality who had been so defrauded.

The complaint of appellee appears on pages 1 to 7 of the transcript, the amendment thereto on pages 9 to 11, and on pages 12 and 13 appears the demurrer of appellant interposed to the complaint as amended, wherein again appellant interposed the plea of the statute of limitations to the pleading. The demurrer was overruled, the cause tried to a jury, and a verdict rendered in the sum of seven thousand ($7000.00) dollars.

The appeal presents the following questions: Error in the overruling of the demurrer; in the denial of a motion for directed verdict made at the close of the case; in the charge of the Court; and in the refusal of instructions requested by appellant.

SPECIFICATION OF ERRORS RELIED ON.

I.

The Court erred in overruling appellant's demurrer to the complaint filed in the above entitled cause.

(See Assignment of Errors, page 25 of Transcript, Assignment No. I.)

II.

The Court erred in denying appellant's motion for a directed verdict.

(See Assignment of Erros, page 27 of Transcript, Assignment No. VI.)

III.

The Court erred in instructing the jury on the question of appellee's belief in the alleged representations, and his reliance thereon.

(See Assignment of Errors, pages 33 to 38 of Transcript, Assignment No. XIII.)

IV.

The Court erred in instructing the jury on the question of the date of the alleged discovery of the falsity of the representations.

(See Assignment of Errors, pages 38 to 41 of Transcript, Assignment No. XIV.)

V.

The Court erred in instructing the jury as to the definition of a "commercial orchard."

(See Assignment of Errors, pages 41 to 42 of Transcript, Assignment No. XV.)

VI.

The Court erred in refusing to instruct the jury on the statute of limitations, as requested in appellant's proposed instruction No. 1.

(See Assignment of Errors, pages 42 to 44 of Transcript, Assignment No. XVI.)

VII.

The Court erred in refusing to instruct the jury on the effect of discovery by appellee of the falsity of the alleged representations.

(See Assignment of Errors, pages 44 to 45 of Transcript, Assignment No. XVII.)

VIII.

The Court erred in refusing to give appellant's proposed instruction No. 4, concerning the difference between representations of fact and matters of opinion.

(See Assignment of Errors, page 45 of Transcript, Assignment No. XVIII.)

IX.

The Court erred in refusing to instruct the jury concerning the effect of appellee's having been able by reasonable diligence to discover the alleged falsity of the representations as to value.

(See Assignment of Errors, page 45 of Transcript, Assignment No. XIX.)

ARGUMENT.

I.

THE COURT ERRED IN OVERRULING APPELLANT'S DEMURRER TO THE COMPLAINT FILED IN THE ABOVE ENTITLED ACTION.

We have hereinbefore referred to the portions of the record wherein appear the complaint and the amendments thereto, and the demurrer interposed by appellant. The demurrer was both general, and, in addition, set up the statute of limitations. This statute of limitations is found in the California Code of Civil Procedure, being Subdivision 4 of Section 338 thereof, and reading as follows:

> "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:
>
> *Within three years:*
>
> An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

In the case of *Sacramento Suburban Fruit Lands Company v. Melin,* No. 5671, pending on appeal in this Court, is a full discussion of the rules of law applicable to cases of fraud brought more than three years after the accrual of the cause of action, together with a full citation of authorities upon which appellant relies herein. For the sake of brevity we will not repeat the arguments and authorities advanced therein and quoted, but will state the propositions therein advanced briefly, in support of our claim herein that the Court erred in overruling appellant's demurrer.

This distinction, however, between the *Melin* case and this case should be noted, to wit, that by an amendment to his complaint the appellee sought to meet the objection herein urged, which effort was not made in the *Melin* case. We submit, however, as we shall hereinafter try to show, that the attempt made by appellee in this regard was abortive, and that in effect his amendment added nothing to the statement of his cause of action in answer to the objection that his action was barred by limitation. Probably the best known statement of the rule in pleading such matters appears in *Lady Washington Consolidated Company v. Wood,* reported in 113 Cal. 486. Summarizing from the statements there, but practically quoting them, we find the following:

The right of a plaintiff to invoke the aid of a Court for relief against fraud after the expiration of three years from the time the fraud was committed is an exception from the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. *This is an element of the plaintiff's right of action and must be affirmatively pleaded by him in order to authorize the Court to entertain his complaint.* "Discovery" and "knowledge" are not convertible terms and whether there has been a discovery of the facts constituting the fraud, within the meaning of the statute of limitations, is a question of law to be determined by the Court from the facts stated. It is not sufficient to make a mere averment

thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, as that they were done in secret or were kept concealed; and he must show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the Court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of these facts.

Testing the original complaint filed herein we find that no attempt was made by the appellee to bring himself within the rules of pleading above stated.

Referring again to the *Lady Washington* case above cited, we quote the following from the opinion therein as particularly applicable to the situation presented in the case at bar:

> "Testing the complaint herein by these rules, it falls far short of showing that the plaintiff is within the exception to the statute, or that its cause of action is not within the apparent bar of the statute. * * * It was necessaary for the plaintiff to allege not only the facts constituting this fraud, but also the facts connected with its

> discovery, so that it might appear from the complaint that the action was not barred by the statute of limitations. The only averment by the plaintiff in this respect is that 'it was not informed of and did not know or discover any of the aforesaid frauds, or the facts connected therewith until within six months preceding the filing of the complaint herein.' It is not averred that any of these facts, or of the transactions set forth as constituting the fraud, were done secretly, or were concealed from the plaintiff, or that any information which it sought was refused, or that, indeed, it sought to obtain any information upon the subject."

To this original complaint a demurrer was interposed which was sustained by the Court below and thereupon appellee amended his complaint as hereinbefore noted. We submit that when the amendment is tested by the same rules, it fails as signally to meet the objection as did the original pleading.

We have hereinbefore analyzed the amendment. The averment that the surrounding lands had been sold to persons resident at points distant from California, and that it was believed generally in the locality of the lands up to February, 1927, that they were fruit lands of the value of three hundred fifty ($350.00) dollars per acre and upwards, adds nothing to the pleading. This is so for the reason that it is not alleged that this appellee ever inquired concerning the value of the lands or their adaptability for fruit culture, even from his neighbors, but it does affirmatively appear that appellee "did not hear from anyone that it was not of said value and was not rich and fertile fruit land prior to the spring of 1927," a period well within the statute of limitations.

It is not alleged, as it could not be alleged, that appellee remained distant from the land he had bought and that he therefore had no opportunity of making a full investigation concerning the truth or falsity of the representations upon which he claimed to have implicitly relied in the purchasing thereof.

This pleading does not attempt to meet the requirement that it must set out the reasons why discovery was not made sooner. It amounts to nothing more than a statement that it was not made. The purpose of pleading the facts constituting the discovery is to enable the Court to see whether or not the facts discovered and the nature of discovery could be said to make a showing of due diligence therein. The significant thing about this pleading is that it amounts to a confession that appellee never made the slightest inquiry concerning the truth or falsity of the representations he had relied upon, although present and living in the community wherein his property so purchased was situated, and having open to him every avenue of information possible in the premises. If the allegations in the pleading be true, this land was totally unfitted for the special purpose for which he claims to have bought it, and was of a value amounting to only one-seventh of the price he paid.

These things were discoverable by the most simple inquiries. If there was any duty of investigation whatever resting upon the appellee it cannot be argued that the exercise of that diligence would not have immediately led to all the information it was possible to obtain upon the matter. That there was such duty resting upon appellee is well decided and is a reasonable requirement.

His pleading discloses that the made a trip to California for the especial purpose of investigating the quality and value of the property he was considering buying. If, as he says, he was unfamiliar with the matters he set out to investigate, it was his duty to make inquiry, provided that ample opportunity was available therefor. The pleading confesses that such was the fact. There is no pleading that confidential relations existed between the parties or that appellee was aged, infirm or incompetent. He therefore shows himself to have been a person possessed of the ordinary prudence, and one who had set about investigating the adaptability of a tract of land for a special use, that is, fruit culture, and, more significant still, for the purpose of investigating the market value thereof. This value he says had theretofore been represented to him to be three hundred fifty ($350.00) dollars per acre, and he states it was a fact at the time he made his investigation that this representation was false, that the land was worth but fifty ($50.00) dollars an acre, and that he came out here to California for the purpose of discovering whether or not it was false.

A man who journeys two thousand miles to investigate the quality and value of a forty-acre tract of land is in a position wherein a pleading of due diligence must necessarily require something more than a continued reliance upon the statements of the adverse party in the transaction. What was the purpose or value of an inspection trip of that extent if he was to take and implicitly rely upon and not test the truth of statements already made to him before

he started upon his journey of inspection? He could have done that just as well back in North Dakota. It is true he attempts to evade the natural conclusion to be drawn from his allegation of an inspection trip by stating that when he arrived here the appellant's agents showed him over the lands casually, and repeated the representations theretofore made, but he cannot escape this proposition—that the very material representation as to value upon which he relied, the falsity of which would measure his loss, since the represented value was the price he was paying, was a matter incapable of concealment and easily investigated. It remained incapable of concealment, and easy to investigate, during all the years he resided in close proximity to the property he had bought.

He came to California in July of 1922, residing in close proximity to his property, and remained there until the fall, when he returned to Canada on business, returning to California in the winter of 1922. He remained there until the fall of 1923, when he was absent from the community for a period, and then has lived there ever since. He does not allege that the made any inquiry whatever, and only goes so far as to say that he did not hear from anyone that the representations made to him were false. Since it is not supposed that anyone but himself was acquainted with what representations were made to him, it is not likely that an ordinarily prudent person charged with the duty of investigating would hear from these ignorant of the subject of the investigation anything about it.

The discrepancy between the represented value and the alleged value, that is, between $350.00 per acre and $50.00 per acre, or, by totals, the difference between $14,000.00 and $2000.00, is, to say the least, a startling difference. We submit his pleading was utterly insufficient to meet the tests above referred to, to inform the Court why his discovery was not made sooner. Lack of inquiry, lack of all effort when inquiry was easy and little effort was required, is not a showing of any *reason* why his discovery was not made sooner. The information was open to him, lay before his eyes. His natural interest in his property is apparent. He alleges he had bought the land as an investment. Men so buying property naturally speculate concerning whether their investment is to be profitable or not. His pleading shows every reason why a normal and prudent man would make some slight inquiry, and shows no reason whatsoever why he would not. To inquire was to discover.

It is never enough to assert simply that the discovery was not sooner made.

> "It must appear that it could not have been made by the exercise of reasonable diligence and all that reasonable diligence would have disclosed, plaintiff is presumed to have known, means of knowledge in such case being the equivalent of the knowledge which it would have produced."
>
> *Montgomery v. Peterson*, 27 Cal. App. 675;
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> *Ruhl v. Mott*, 120 Cal. 668;
>
> *Bacon v. Soule*, 119 Cal. App. 427.

As stated in *Johnston v. Kitchin*, 265 Pac. 941, by the California Supreme Court, no secret "could be suppressed that would or could affect the value of a

commercial city lot, the title to which is a public record and its value an open matter of investigation to the entire public. We know of none, and think in a practical sense, none can exist."

These remarks are equally and particularly applicable to the situation presented by the pleading of appellee.

> "If the party affected by any fraudulent transaction or management might with ordinary care and attention have seasonably *detected* it, he seasonably had actual knowledge of it."
>
> *Angell on Limitations,* Section 187.

The meaning of the terms "diligence," "investigation," "detection," when used as descriptive of the obligation resting upon one who claims to have been defrauded to detect the presence of fraud, does not mean slumbering until a stranger awakens the slumberer and informs him, *ex industria,* of the fraud.

No doubt appellee pleaded as strongly as he could, but he did not meet the test, as, of course, he could not meet it, for it is utterly impossible for an owner having purchased property for investment purposes and expecting to make a profit therefrom, and therefore presumptively knowing the value thereof, to reside in close proximity thereto for three years and then show by a pleading why he did not during that period discover that there was a value of only one-seventh the amount he had paid therefor. We submit the demurrer should have been sustained.

II.

THE COURT ERRED IN OVERRULING THE MOTION FOR A DIRECTED VERDICT.

All that has been said heretofore on the matter of the sufficiency of appellee's pleading to show his action was not barred by the statute of limitations is applicable here. However, the situation is strengthened by a consideration of the testimony which appellee introduced in support of his allegations as to non-discovery. His testimony appears on pages 47 to 67 of the transcript, and the following constitutes his showing in respect of this point now under discussion.

He made a trip to California in May of 1922, before his purchase. (Transcript, page 49.) He made no investigation except with the agent of appellant. (Transcript, page 49.) He came back to California to live in July of 1922. At that time he asked that two lots his contract covered be exchanged for two others, which was done. (Transcript, page 50.) He was away from Sacramento in the fall of 1922 for about three months. He went to the lands and looked them over once in a while, perhaps half a dozen times. He saw trees growing in the neighborhood of his lands which did not appear to be doing their very best. "I did not find out the land I had bought was not adapted to tree raising before 1928." "About February, 1928, I heard that the land was not worth $350 an acre * * * before that time I had never heard it was not worth that price, and I had never heard before that it was not fruit land. I had never talked with any of the neighbors out there about it." (Transcript, page

51.) "I own farms in Canada, maybe a thousand acres. * * * I did not have any other business except farming. * * * I bought land for myself sometimes, and sold it again." (Transcript, page 52.) "I spent about four days all told in Sacramento on my first visit. * * * I did not communicate with any citizens of Sacramento during that week about your land in Rio Linda. I did not call at the office of any real estate dealer in Sacramento during that time. When we went out on the land we looked at it. I did not examine the soil." (Transcript, page 55.)

After he had moved to Sacramento it appears that appellee considered that he knew enough about the land the appellant was selling to justify him in likewise engaging in the sale thereof. He wrote from Sacramento, under date of August the 8th, that he was going to go to Canada, where he formerly lived, about the 15th of that month, and that if he found his neighbors there had "more money than they can handle I will try and sell them some of your California lands if there is any commission in it for me, and if I can hang a few on the fence you might come and help me close the deals." (Transcript, page 61.) In April, 1923, he claimed commissions for sales he had made, writing to appellant that he "was to have commission for the land sold to Torger Olsen, T. J. Cummins and R. E. Mackersee, all of Minot. Maybe you have overlooked this, but I have a letter to show from the company that they promised me five per cent of all the sales I could hang on the fence at Minot, and I sure did put those parties on the fence, and worked hard for it, and I can prove it by the parties that I

did, so please send me a statement. * * * " (Transcript, page 62.)

As indicating his attitude of mind toward those engaged in the nefarious practice of selling land, he wrote the appellant on May 29, 1922, after he had returned from his inspection trip that he was engaged in making sales of this land for the appellant, had "certainly hustled up that deal and should get my commissions for same"; that he could "make quite a few land sales there because people have got pretty good confidence in me if I am a real estate and grain buyer. You know that as a rule that this class of people has got pretty bad characters." (Transcript, page 57.)

Appellee further testified (Transcript, page 64):

> "From the time I moved my family to Sacramento, it was the 7th of February, 1928, before I made any personal inspection of the soil on this land. During the time I lived there from 1922 I went out there a few times. * * * I did not find any commercial orchards in the neighborhood of may land during none of that time. * * * I did not see them actually planting trees, nor blasting holes for planting trees. I did not see the digging of wells or well pits on any of the lands in the neighborhood of my land. I did not examine the soil on any of the lands near mine during that time. I did not inquire of any of the neighbors during all of these years about the soil. I did not inquire of any of the neighbors or the people in Sacramento as to whether or not fruit could be grown on this land. *I made no inquiry whatsoever.* During all that time up until February, 1928, I believed that fruit could be grown on that land which I bought, and believed during all of this time up to February, 1928, that fruit of all kinds could be grown generally in the vicinity

of my land. No one had ever told me to the contrary, and I had no notice that fruit would not grow." (Transcript, page 65.)

As indicative of how truthful the appellee was in the foregoing sweeping statements, he wrote on March 4, 1924, to the appellant, stating: "My boys are afraid of the chicken business. They cannot see any money in it, and they won't go out there and they say they cannot raise fruit to any success. Our neighbor put in twenty acres of grapes and they died out." (Transcript, page 65.)

Summing up the testimony of appellee upon this most important matter, it amounts simply to this, that although living in close proximity to the property, he had purchased during the period from July, 1922, up to three years prior to the commencement of his action on February 29, 1928—though he had alleged he bought the land for an investment, though actively engaged in selling adjoining lands to his former neighbors and claiming commissions therefor, though thus interested in the quality of the soil and the value thereof during all that period, though a dealer in real estate himself and accustomed to the purchase and sale of lands on his own account, he yet contents himself with a bald declaration that he never made any inquiry of anybody about the value or about the quality of the soil, and remained in total ignorance of both matters until six years after his purchase. He began dealing in these lands, selling them to his neighbors, in 1922. Of course it was necessary for him to discuss price and the quality. If it be true, as he contends and as the jury found, that

the representations made to him about value and quality were false, he knew they were false. It is preposterous to come to any other conclusion.

Directing the Court's attention again to the authorities hereinbefore referred to concerning his situation in respect of the statute of limitations, wherein it is set forth that, having relied upon these representations and thereafter having come promptly into full opportunity for testing their truth, and having in this case the additional duty to investigate these things if he was to deal in these lands as an agent of appellant, the conclusion becomes irresistible either that he falsified when he said he did not know anything about it, or that he failed utterly to show that he used any diligence whatsoever to discover. A clearer case of bar by the statute of limitations from the evidence introduced could not be made out. We submit the Court erred in refusing to direct a verdict in favor of appellant upon that ground.

III.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF APPELLEE'S BELIEF IN THE ALLEGED REPRESENTATIONS AND HIS RELIANCE THEREON.

The instructions of the Court upon this matter are found on pages 33 to 38 of the transcript. In the consideration of this specification, it is well to bear in mind the following: Appellee was a farmer and a dealer in farm lands. (Transcript, page 52.) He believed as to dealers in real estate that "this class of

people has got pretty bad characters," although he says that his neighbors had "pretty good confidence in me, if I am a real estate and grain buyer." (Transcript, page 57, letter of May 29, 1922.) He came to California for the purpose of making an investigation concerning the property he was buying, and stayed there in the vicinity of the land for nearly a week before returning and signing his contract. Under these circumstances the fair presumption is that he did not rely upon what was told him, but, on the contrary, formed his own opinion by special investigation undertaken for that purpose, both as to the quality and as to the value of the land.

> "Upon the question of value, the purchaser must rely upon his own judgment and it is his folly to rely upon representations of the vendor in that respect." *Ellis v. Andrews,* 56 N. Y. 83.
>
> "Positive statements as to value are generally mere expressions of opinion." *Kimber v. Young,* 137 Fed. 744. (70 C. C. A. 178.)
>
> "The law recognizes the fact that a man will naturally overstate the value and qualities of the articles which they have to sell. All men know this and a buyer has no right to rely upon such statements." (Same.)
>
> "If a purchaser of real estate visits the property prior to the sale and makes a personal examination of it touching representations made as to its quality, character or condition, he will be *presumed* to rely not upon the representations, but upon his own judgment in making the purchase, provided the vendor does nothing to prevent his investigation being as full as he chooses." *Everist v. Drake,* 143 Pac. 814. (*Southern Development Co. v. Silva,* 125 U. S. 257; *Farrar v. Churchill,* 135 U. S. 609; *Wainscott v. Occidental etc. Assn.,* 98 Cal. 253.)

In respect of this question of reliance, the Court told the jury:

> "Did the plaintiff believe those representations? Did they influence him in whole or in part? Did he rely upon them in whole or in part, and was thereby induced to buy the land which otherwise he would not have bought? What is the situation in respect to that? Plaintiff was a Minnesotoan, if I remember right. He fell in with Amblad down in North Dakota and discussed this land. First he had the book. He never had been to California. I am taking his statement for it. He says he did not know anything about California lands, fruit lands or what they were adapted to or the manner of raising California fruits, commercially or otherwise. He says he did believe Amblad, and he believed the book. Ask yourselves why he shouldn't. Why shouldn't he believe and act upon them? He entered into a contract after they had been made to him and turned over some property right in the beginning to the defendant. * * * He made an offer to buy the land, provided the defendant would accept the offer. * * * I do not remember when it was accepted, but so far as plaintiff knew it was not accepted until after he had been out in this country." (Transcript, page 34.)

In what, we respectfully submit, seems to be an effort to minimize the legal effect of appellee's inspection trip, the Court said:

> "After the plaintiff discussed the matter with Amblad and read the book, he said he came to California to look at the land. He talked to Amblad and listened to his reports with respect to the property and when he came to Sacramento he found Amblad right at the depot. Amblad took him along. Was that for the purpose of making sure of him, and seeing to it that he did not fall into the hands of somebody else? Ask yourselves

that question. Amblad took him around for four days. Plaintiff says they were on this land only once. He did not see anything wrong with it. They made a casual inspection. Amblad says they just walked over it and made a surface inspection. * * * For what purpose would a real estate man take a prospect out to other sections to show him growing orchards? The plaintiff says Amblad told him his land would be like that when it was planted sufficiently along with fruit for commercial purposes.

There is a rule of law, Gentlemen, which is this: If the party does not rely on the representations made to him, but relies upon what he sees, sees upon the land, and if he discovers the truth in his inspection, then, of course, he cannot say that he relied upon representations, but you must remember that plaintiff was dealing with experts, and that he was not an expert in California lands and fruit lands. * * * Having inspected the land thus far, a surface inspection; to see the layout, as Amblad said, and plaintiff said—plaintiff says he was there once and Amblad says several times—the plaintiff went East. Then he wrote to the defendant 'Let the bargain go through. I found more than I expected.' What does that indicate to you? What would a reasonable person infer? That he found out that the land was not worth $350 an acre? That he found out that it was not adapted to commercial orcharding? If he had found out those things would he have likely went on with the bargain and paid $14,000 for those acres? You may see in those letters the extent of plaintiff's inspection, and whether he did discover anything to show him that those representations were false. The bargain was made. He did buy. * * * After that he served as an agent to some extent under Amblad, and was offering the lands. He is entitled to the same presumption that anyone is, that he intended to act fairly and honestly with his prospective customers." (Transcript, page 37.)

Now it is especially significant, we submit, that the Court found it advisable to make so many observations tending to convince the jury that in spite of the very obvious results that would ordinarily flow from an experienced buyer's personal inspection upon the ground and in the community, touching quality of the soil, and, particularly, value thereof, that appellee was entitled to a finding at the hands of the jury that he did rely upon the representations made to him. The Court takes care to observe that Amblad met appellee at the railroad station and showed him over the land, but fails to observe that appellee, out here for the purpose of making an inspection, was a free man, entitled to go where he chose, and ask whom he pleased, not handcuffed to the agent of appellant. Why did not the Court suggest the probability that if, when he arrived here he met the same agent who had lied to him before, he would as an experienced "real estate buyer," believing that other real estate men were pretty "bad characters" and if, as the Court suggested, the probabilities were that he was being waylaid to prevent him from making independent inquiry, that appellee would have said, "Such extraordinary exertions point to something concealed, and I will make independent inquiry." The jury did not have to take this man's preposterous statements, that, having come two thousand miles to investigate this land, he asked questions of nobody except the agent of appellant, whose statements concerning it he has theretofore had. No, the Court, we submit, went to considerable lengths to submerge these considerations, and to advance, on the contrary, the best argument

possible as to why the jury would be justified in holding that the appellee had relied upon the representations made. The giving of this instruction was duly excepted to. (Transcript, page 170.) We submit it was extremely unfair, argumentative and exceeding all proper bounds of comment on the testimony. Its giving was error.

IV.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF THE DATE OF THE ALLEGED DISCOVERY OF THE FALSITY OF REPRESENTATIONS.

The instruction of the Court upon this matter is found on pages 38 to 41 of the transcript. We submit that the instruction is contrary to law in that it failed to properly tell the jury what was required of appellee in establishing, as he was bound to do, that he had used due diligence to detect the fraud after moving within the vicinity of the property he had bought, and that he was unable thereby to do so.

The Court, throughout this charge, treats this matter as one wherein nothing in the way of diligence was required of this man, and, in effect, charges him only with the duty of diligence after he had actually discovered fraud or facts sufficiently strong to give him notice thereof. Thus the Court says:

> "The law is that a person who has been defrauded, as plaintiff alleges that he was in this case, must bring his suit within three years after he discovers the fact. Of course, if he is defrauded he is deceived, he is in ignoraance. The law says the moment that that ignorance is dispelled and you discover you have been deceived,

> you must bring your suit within three years thereof, or you cannot sue at all." (Transcript, page 38.)

Nothing herein is said of his duty to investigate after ample opportunity is given to do so. Nothing is said concerning his showing of why a discovery was not in fact made sooner. Nothing is said about the distinction between knowledge and discovery. Again the Court said:

> "If he found out before March 1, 1925, that these representations or either of them (quality and value) was false, if he found it out before March 1st, 1925, he brought his suit too late. * * * So, if he found the fact out before March 1st, 1925, he brought his suit too late." (Transcript, pages 38 and 39.)

Here again the Court charges appellee only with a duty to act after knowledge of fraud has been gained by him. From that point on the instruction is concerned wholly with excusing his failure to discover, and with argument from the facts that he did not discover, and should not be held to have been barred. Thus the Court says:

> "The inference is that he rested confidently on the representations that had been made to him. * * * He says he heard nothing about the land. No one told him it was not worth so much money, no one told him it was not adapted to commercial orcharding, and he did not know." (Transcript, page 39.)

> "Would it have disclosed to him that the land was not adapted to commercial orcharding, or that the land was not worth $350 an acre? He is not bound to accept casual observations as true, even if he heard of it. He says he did not." (Transcript, page 40.)

We will not quote the entire instruction. We submit it is argumentative in the extreme, does not state the law, and surpasses the legitimate bounds of comment upon testimony.

The exception to this instruction appears at page 170 of the transcript.

V.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE DEFINITION OF A "COMMERCIAL ORCHARD."

The instruction upon this matter appears on pages 41 and 42 of the transcript. It was duly excepted to. (Transcript, page 170.)

The portion of the instruction objected to is that requiring that a crop be returned before an orchard can be considered a commercial orchard. We submit that market prices have nothing whatsoever to do with the matter of a commercial orchard, insofar as is concerned the adaptability of land for that use. The land has nothing to do with markets. The representations complained of and alleged to have been made were not representations that a money profit could be made, but were concerned solely with the amount of fruit that could be grown, and the quality thereof. This instruction was given to the jury seven years after the sale was made, and at a time when, as is well known, the orchard industry in this state has been the victim of heavy losses. The Court emphasized this matter of profit. It said:

"Eventually when it does begin to bear it must not only liquidate that expense, but also for the series of years, it must show a profit * * *"
(Transcript, page 42.)

VI.

THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 1.

Appellant requested an instruction upon the matter of the Statute of Limitations. This requested instruction appears on pages 42, 43 and 44 of the Transcript. It was presented and designed for the purpose of pointing out what the Court had, as we have heretofore said, so signally failed to point out to the jury, to wit, that the duty rested upon appellee after he began living in the vicinity of the land he had bought, to exercise ordinary diligence to discover whether or not the representation in respect thereof upon which he was still relying was in fact true. The Court had told the jury, as we have heretofore quoted, that the inference was he was, during all this time, relying upon these representations. If this were true he must have known it. He must have been conscious of it. Under the circumstances, since particularly on the matter of value, information was readily accessible, certainly as readily accessible then as it has ever been, it was important to have the jury informed that he did owe a positive duty of exercising reasonable diligence to detect, discover, test out the truth of these representations upon which he was relying. The instruction requested was designed to serve that need

of the jury, if it was to fairly pass upon the issues in this case. Not only in this case, but in all of its companion cases wherein the Statute of Limitations was an issue, the Court was requested over and over again to inform the jury concerning this duty of investigation, and it steadily refused to do so; on the contrary, concerning itself mainly with commenting upon the testimony in such a way as to persuade the jury of the entire reasonableness of a finding on their part that the causes of action were not barred.

This issue was clean-cut throughout the cases. Steadily the Court has refused, as it refused in this case, to say anything about the matter of diligence in detecting fraud, or the duty resting upon the plaintiff to exercise it. We submit the refusal to give the instruction was error.

VII.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THE EFFECT OF THE DISCOVERY BY APPELLEE OF THE FALSITY OF THE ALLEGED REPRESENTATIONS.

The appellant requested the Court to instruct the jury as follows:

> "You are further instructed upon the matter of the plaintiff's discovery of the alleged fraud that if plaintiff discovered that a material representation concerning the land he bought was false, then he was at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring his action within three years of the discovery of the falsity of any material representation concerning the land."

We submit that in this case the foregoing instruction should have been given. This appellee was an experienced dealer in real estate, and was actively engaged shortly after buying his property here in selling it to others. Notwithstanding the possibility that he may have been doing so in reliance upon his belief in the truth of the statements made to him in its purchase, there was certainly open to this jury under the foregoing evidence the right to believe and to conclude that he in fact did know what he was thus presumptively held to have known, that is, the true value of his property, and so believing, it would have been proper for the jury to apply the rules stated in the instruction that if he did know that the representations in respect of value were false, then he was presumed to have knowledge of the truth or falsity of the representations touching quality of his land. The matter was entirely omitted from the charge of the Court, and the refusal to give the requested instruction was error.

The exception thereto was duly made by appellant. (Transcript, page 171.)

VIII.

THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTION NO. 4, CONCERNING THE DIFFERENCE BETWEEN REPRESENTATIONS OF FACT AND MATTERS OF OPINION.

The Court was requested by appellant to instruct the jury as follows:

> "You are instructed that a representation which merely amounts to a statement of opinion,

judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, although it may not be true, for a party is not justified in placing reliance upon such statement or representation." (Transcript, page 45.)

Under the circumstances of this case, we submit the foregoing instruction should have been given. This man had made an inspection of the lands, and, particularly with regard to the representation of value, there was nothing concealed or that could have been concealed concerning its truth or falsity. He was in the very place where he could have obtained information about it, and since he came here for that purpose, in spite of his testimony that he did not inquire, it was a fair inference from the fact of his having come here, that his testimony upon that point was false. It is rare that statements of value are, legally speaking, representations of fact. As we have heretofore shown, by authorities quoted from, it is only where one person possesses superior opportunity for investigation and knowledge that such a statement can ever amount to more than a statement of an opinion. The rule that such statements are matters of opinion was fairly applicable here, and the Court did not touch upon the matter in its instructions.

IX.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY CONCERNING THE EFFECT OF APPELLEE'S HAVING BEEN ABLE BY REASONABLE DILIGENCE TO DISCOVER THE ALLEGED FALSITY OF THE REPRESENTATIONS AS TO VALUE, AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTION NO. 5.

The Court was requested to instruct the jury as follows:

> "You are instructed that if the plaintiff discovered, or by the exercise of reasonable diligence could have discovered, the falsity of representations as to value of the land he bought more than three years before he commenced his action, then your verdict must be for the defendant." (Transcript, page 46.)

Appellant was clearly entitled to the giving of this instruction. As we have heretofore said, it is incomprehensible that under the circumstances this matter of value should not have been inquired of by appellee during the years extending between the date of his purchase and a date three years before the beginning of his suit. During all that period the information was readily available.

Furthermore, appellee was dealing in these lands. The conclusion is well-nigh irresistible that he did then discover all that he has ever known about their value. Certainly reasonable diligence, even the slightest inquiry, would have disclosed these matters to him, and if he knew the falsity of that representation he knew the falsity of the most important statement made to him, for the measure of the falsity of that statement was the measure of his damage.

His own expert on value, Mr. Kerr, testified that even had his land been fruit land, it would only have been worth $125 to $150 an acre (Transcript, page 73), whereas, according to the same witnesses' testimony and the allegations of appellee's pleadings, the actual value differed from the represented value and the price paid by a much greater margin.

If, then, the jury concluded that he did discover this matter of value misrepresentation, they should have been told its effect upon his cause of action, and the consequent duty upon him to make prompt and thorough investigation as to the remaining representations. Little attention was paid to this value representation by the Court in its charge, much emphasis placed upon the representations as to quality of soil, and, particularly the assumed difficulty attending its discovery. But here was something which lay open and patent before the eyes of appellee, a matter in which he certainly must have been vitally interested, and can be reasonably held by that interest to have been driven to inquire. The instruction should have been given. The refusal was duly excepted to. (Transcript, page 170.)

We ask that the judgment be reversed.

Respectfully submitted,

BUTLER, VAN DYKE & DESMOND,

EDWARD P. KELLY,

Attorneys for Appellant.

No. 5707

United States Circuit Court of Appeals

For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

FRANK L. HAYES,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorneys for Appellant:
BUTLER, VAN DYKE & DESMOND, Esqs.,
EDWARD P. KELLY, Esq.,
Sacramento, Calif.

Attorneys for Appellee:
MARTIN I. WELSH, Esq.,
A. H. MORGAN, Esq.,
Sacramento, Calif.

In the Northern Division of the United States District Court, for the Northern District of California.

No. ——. Dept. ——.

FRANK L. HAYES,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT AND LAND COMPANY, a Corporation,

Defendant.

COMPLAINT.

Plaintiff complaining alleges:

I.

That the defendant is now and at all times herein mentioned has been a corporation duly organized and existing under the laws of the State of Minne-

sota, and is now and at all times herein mentioned has been doing business in the State of California, having its principle place of business in the City of Sacramento, County of Sacramento, State of California.

II.

That plaintiff is a citizen and resident of the State of California; that defendant is a resident of the State of Minnesota, and the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

That on and prior to the 30th day of June, 1926, plaintiff was residing in the City of Omaha, State of Nebraska, and was wholly unfamiliar with California farm and fruit lands, and/or of the nature, quality, and/or value thereof, and in all the dealings and each thereof hereinafter referred to, plaintiff was compelled to and did rely entirely upon the statements and representations of defendant with respect thereto. [1*]

IV.

That defendant well knew that plaintiff was unfamiliar with each of the matters and things contained in the representations hereinafter set forth; that said representations and statements and each of them were made by defendant with intent on the part of defendant to cheat and defraud plaintiff and to induce plaintiff to enter into the contract hereinafter referred to; that defendant falsely and fraudu-

*Page-number appearing at the foot of page of original certified Transcript of Record.

lently stated and represented to plaintiff that all of the land in the county of Sacramento, State of California, then being sold by defendant was, and particularly that all of that certain land hereinafter described, and which was sold to plaintiff as hereinafter set forth, of the fair and reasonable value of $400.00 for each acre thereof, and that the hereinafter mentioned parcel of land sold to plaintiff was of the fair and reasonable value of $5,056.-00; that all of the land thereof was rich and fertile and was capable of producing all sorts of farm crops and produce; that all of said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that all of said land was perfectly adapted to the raising of all kinds of deciduous fruits in commercial quantities; that all of said land was capable of producing large crops of any kind of deciduous fruits planted thereon, and that said crops were of the finest quality; that said land was of the same quality of other land in the State of California and of other land in the vicinity of said land which has proven to be rich and productive and capable of producing large and profitable crops of all kinds of farm produce and particularly of large and profitable crops of deciduous fruits.

V.

That on the 29th day of June, 1926, and for a long time previous thereto, plaintiff was the owner of certain real property situated in the City of Omaha, State of Nebraska, particularly described as [2] follows, to wit:

North 38½ feet of the East 107.5 feet of Lot 34 Elliston Park Place Addition.

That said real property hereinabove described was of the fair and reasonable value of $6,800.00, subject however, to a mortgage securing the sum of $4,136.39.

VI.

That plaintiff relied upon said representations and each of them and believed them to be true, and solely by reason of plaintiff's reliance thereon, plaintiff, on or about the 29th day of June, 1926, entered into a contract with defendant whereby plaintiff agreed to purchase of defendant at a price of $5,056.00, 12.65 acres of said land in the county of Sacramento, State of California, described as follows:

Lot Seventy-eight (78) Rio Linda Subdivision Number Six as per the official map thereof filed in the office of the County Recorder of The County of Sacramento, State of California; located in Sec. 34–35–H. of Rancho Del Paso.

That as a part payment thereon plaintiff conveyed to defendant said real property theretofore owned by plaintiff and situated in the city of Omaha, State of Nebraska, hereinabove described and mentioned, at the agreed valuation of $6,800.00, subject, however, to said mortgage in the sum of $4,136.39, and defendant agreed to and did accept conveyance thereof as part payment on said contract in the sum of $2,663.61; that thereafter plaintiff paid to defendant the further sum of $1,611.69, in cash, or thereabouts for and on account of said contract.

VII.

That plaintiff well and faithfully did and performed all the covenants and conditions of said contract on his part to be performed and is ready, willing and able to perform all additional terms, covenants and conditions thereof. [3]

VIII.

That said representations were, and each of them was, at the time of making thereof, false and untrue and were known to defendant to be false and untrue. That it was not then, there or at all true that any of said real property in Sacramento County, State of California, then being sold by defendant was of the fair or reasonable value of in excess of $25.00 per acre and/or that any of said land was fertile or would produce any crops in commercial quantities and/or was at all adapted to the growing of fruit-trees and/or was capable of producing any merchantable fruits and/or that any of said land was at all similar in quality to said other land so represented to plaintiff to be similar thereto. That on the contrary said land was and is poor and unfertile, and was and is underlaid with hard-pan and clay, and a considerable portion thereof is subject to and does periodically become inundated with water from a creek or slew adjacent thereto; that by reason thereof said land was not and is not adapted to the growing of fruit-trees of any kind or of any farm crops and produce of any kind thereon in commercial or paying quantities.

IX.

That plaintiff believed said representations of

defendant to be true and relied thereon and made no other investigations thereof, save a casual inspection made under the guidance and direction of defendant, at which time and during the course of which no circumstance came to the attention of plaintiff which did or should have put plaintiff upon notice of the untruth of said representations.

IX.

That by reason of the false and fraudulent representations of defendant made to plaintiff as aforesaid, and by reason of plaintiff entering into said contract with defendant [4] in reliance thereon as aforesaid, plaintiff has been damaged in the sum of $8,490.00.

X.

That said acts of defendant, and each of them, and defendant's whole course of conduct was unlawful, malicious, fraudulent, and oppressive and a reasonable sum to be allowed plaintiff as punative and exemplary damages therefor is the sum of $2,500.00.

And as a second and separate cause of action plaintiff complains and alleges:

I.

That the defendant is now and at all times herein mentioned has been a corporation duly organized and existing under the laws of the State of Minnesota (and is now and at all times herein mentioned has been doing business in the State of California, having its principle place of business in the city

of Sacramento, county of Sacramento, State of California.)

II.

That plaintiff is a citizen and resident of the State of California; that defendant is a resident of the State of Minnesota, and the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

That on and prior to the 3d day of March, 1927, plaintiff was residing in the city of Omaha, State of Nebraska, and was wholly unfamiliar with California farm and fruit lands, and/or of the nature, quality and/or value thereof, and in all the dealings and each thereof hereinafter referred to, plaintiff was compelled to and did rely entirely upon the statements and representations of defendant with respect thereto. [5]

IV.

That defendant well knew that plaintiff was unfamiliar with each of the matters and things contained in the representations hereinafter set forth; that said representations and statements and each of them were made by defendant with intent on the part of defendant to cheat and defraud plaintiff and to induce plaintiff to enter into the contract hereinafter referred to; that defendant falsely and fraudulently stated and represented to plaintiff that all of the land in the County of Sacramento, State of California, then being sold by defendant, was and particularly that all of that certain land hereinafter described, and which was sold to plain-

tiff as hereinafter set forth, was of the fair and reasonable value of $400.00 for each acre thereof, and that the hereinafter mentioned parcel of land sold to plaintiff was of the fair and reasonable value of $4,000.00; that all of the land thereof was rich and fertile and was capable of producing all sorts of farm crops and produce; that all of said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that all of said land was perfectly adapted to the raising of all kinds of deciduous fruits in commercial quantities; that all of said land was capable of producing large crops of any kind of deciduous fruits planted thereon, and that said crops were of the finest quality; that said land was of the same quality of other land in the State of California and of other land in the vicinity of said land which has proven to be rich and productive and capable of producing large and profitable crops of all kinds of farm produce and particularly of large and profitable crops of deciduous fruits.

V.

That on the 3d day of March, 1927, and for a long time previous thereto, plaintiff was the owner of certain real property [6] situated in the city of Omaha, State of Nebraska, particularly described as follows, to wit:

> Lot 26 Victor Place, on addition to the City of Omaha, Nebr., known as 1620 Victor Ave., Omaha, Nebr.

That said real property hereinabove described was of the fair and reasonable value of $5,800.00, subject, however, to a mortgage securing the sum of $3,000.00.

VI.

That plaintiff relied upon said representations and each of them and believed them to be true, and solely by reason of plaintiff's reliance thereof, plaintiff, on or about the 3d day of March, 1927, entered into a contract with defendant whereby plaintiff agreed to purchase of defendant at a price of $4,000.00, 10 acres of said land in the county of Sacramento, State of California, described as follows:

> Lot Eighty-three (83) in Rio Linda Subdivision No. 6, as per the official map thereof filed in the office of the Recorder of the County of Sacramento, State of California.

That as a part payment thereon plaintiff conveyed to defendant said real property theretofore owned by plaintiff and situated in the city of Omaha, State of Nebraska, hereinabove described and mentioned, at the agreed valuation of $5,800, subject, however, to said mortgage in the sum of $3,000.00, and defendant agreed to and did accept conveyance thereof as part payment on said contract in the sum of $2,800.00; that thereafter plaintiff paid to defendant the further sum of $527.20, in cash, or thereabouts for and on account of said contract.

VII.

That plaintiff well and faithfully did and per-

formed all of the covenants and conditions of said contract on [7] his part to be performed and is ready, willing and able to perform all additional terms, covenants, and additions thereof.

VIII.

That said representations were, and each of them was, at the time of making thereof, false and untrue and were known to defendant to be false and untrue. That it was not then, there or at all true that any of said real property in Sacramento County, State of California, then being sold by defendant was of the fair or reasonable value of in excess of $25.00 per acre, and/or that any of said land was fertile or would produce any crops in commercial quantities and/or was at all adapted to the growing of fruits, trees and/or was capable of producing any merchantable fruits and/or that any of said land was at all similar in quality to said other land so represented to plaintiff to be similar thereto. That on the contrary said land was and is poor and unfertile, and was and is underlaid with hard-pan and clay; that by reason thereof said land was not and is not adapted to the growing of fruit-trees of any kind or of any farm crops and produce of any kind thereon in commercial or paying quantities.

IX.

That plaintiff believed said representations of defendant to be true and relied thereon and made no other investigations thereof, save a casual inspection made under the guidance and direction of defendant, at which time and during the course of

which no circumstances came to the attention of plaintiff which did or should have put plaintiff upon notice of the untruth of said representations.

X.

That by reason of the false and fraudulent representations of defendant made to plaintiff as aforesaid, and by reason of plaintiff entering into said contract with defendant, [8] in reliance thereon as aforesaid, plaintiff has been damaged in the sum of $3,750.00.

XI.

That said acts of defendant, and each of them, and defendant's whole course of conduct was unlawful, malicious, fraudulent, and oppressive and a reasonable sum to be allowed plaintiff as punative and exemplary damages is the sum of $2,500.00.

WHEREFORE, plaintiff prays judgment for $17,240.00, with interest at the rate of 7% per annum upon the following portions of said principal amount from and after the following dates:

On $2,357.61 from and after June 29, 1926,
On $1,175.50 from and after Mar. 25, 1927,
On $ 833.55 from and after Nov. 17, 1927,
On $2,556.00 from March 3d, 1927,

—and for plaintiff's costs of suit and for such other and further relief as to the Court shall seem meet and proper.

Dated: March 14, 1928.

MARTIN I. WELSH,
Attorney for Plaintiff. [9]

State of California,
County of Sacramento,—ss.

Frank L. Hayes, being duly sworn, on oath deposes and says he is the plaintiff in the within entitled proceeding and that he has read the foregoing and annexed complaint and knows the contents theerof, and that the same is true of his own knowledge, except as to such matters as are therein stated upon his information or belief, and as to such matters he believes it to be true.

FRANK L. HAYES.

Subscribed and sworn to before me this 14 day of March, 1928.

[Seal] JOSEPH L. KNOWLES,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Mar. 14, 1928. [10]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes defendant, Sacramento Suburban Fruit Lands Company, a corporation, sued herein as Sacramento Suburban Fruit and Land Company, a corporation, and demurs to the complaint of plaintiff on file herein, and for grounds of demurrer alleges as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this, that it cannot be ascertained therefrom why, or for what reasons plaintiff was compelled to, or did, rely upon the statements and representations of defendant, alleged to have been made in respect to the lands alleged to have been purchased by the plaintiff; what is meant by the terms, "rich and fertile," and "capable of producing all sorts of farm crops and produce"; why, or for what reasons said lands described in plaintiff's complaint are not rich or fertile, or capable of producing crops and produce; what conditions or things of, or in, said lands, are injurious or harmful, to the growth of fruit-trees; why, or for what reasons said lands are not adapted for the raising of deciduous fruits; what is meant by the term "commercial quantities"; [11] what other lands are referred to in plaintiff's allegation that the land he purchased was represented to be of the same quality of other land in the State of California, and of other land in the vicinity of said land.

III.

That said complaint is ambiguous and unintelligible for each of the reasons hereinabove given for its being uncertain.

Further demurring to said complaint, and more specifically demurring to the first cause of action therein contained, for grounds of demurrer, defendant alleges as follows:

I.

That the first cause of action contained in said

complaint does not state facts sufficient to constitute a cause of action.

II.

That said first cause of action in said complaint contained is uncertain in this, that it cannot be ascertained therefrom why, or for what reasons plaintiff was compelled to, or did, rely upon the statements and representations of defendant, alleged to have been made in respect to the lands alleged to have been purchased by the plaintiff; what is meant by the terms, "rich and fertile," and, "capable of producing all sorts of farm crops and produce"; why, or for what reasons said lands described in plaintiff's complaint are not rich or fertile, or capable of producing crops and produce; what conditions or things of, or in, said lands, are injurious or harmful, to the growth of fruit-trees; why, or for what reasons said lands are not adapted for the raising of deciduous fruits; what is meant by the term, "commercial quantities"; what other lands are referred to in plaintiff's allegation that the land he purchased was represented to be of the same quality of other land in the State of California, and of other land in the vicinity of said land. [12]

III.

That said first cause of action in said complaint contained is ambiguous and unintelligible for each of the reasons hereinabove given for its being uncertain.

Further demurring to said complaint, and more specifically demurring to the second cause of action

therein contained, for grounds of demurrer, defendant alleges as follows:

I.

That the second cause of action contained in said complaint does not state facts sufficient to constitute a cause of action.

II.

That said second cause of action in said complaint contained is uncertain in this, that it cannot be ascertained therefrom why, or for what reasons plaintiff was compelled to, or did, rely upon the statements and representations of defendant, alleged to have been made in respect to the lands alleged to have been purchased by the plaintiff; what is meant by the terms, "rich and fertile," and, "capable of producing all sorts of farm crops and produce"; why, or for what reasons said lands described in plaintiff's complaint are not rich or fertile, or capable of producing crops and produce; what conditions or things of, or in, said lands are injurious or harmful, to the growth of fruit-trees; why, or for what reasons said lands are not adapted for the raising of deciduous fruits; what is meant by the term, "commercial quantities"; what other lands are referred to in plaintiff's allegation that the land he purchased was represented to be of the same quality of other land in the State of California, and of other land in the vicinity of said land.

III.

That said second cause of action in said complaint contained is ambiguous and unintelligible

for each of the reasons hereinabove given for its being uncertain. [13]

WHEREFORE, defendant prays that plaintiff take nothing by his action herein, and that it be hence dismissed with its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

Service hereof is hereby admitted and receipt of copy acknowledged this 31st day of March, 1928.

MARTIN I. WELSH,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 31, 1928. [14]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 9th day of April, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 9, 1928—ORDER OVERRULING DEMURRER.

The demurrer to complaint came on regularly this day for hearing, and by consent of the attorneys, ORDERED demurrer be overruled, with 20 days to answer. [15]

[Title of Court and Cause.]

ANSWER.

Now comes defendant above named, and answering plaintiff's complaint on file herein, admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in Paragraphs I and II of the first cause of action in plaintiff's complaint.

II.

Admits that on and prior to the 30th day of June, 1926, plaintiff was residing in the city of Omaha, State of Nebraska.

III.

Admits that on the 29th day of June, 1926, plaintiff was the owner of the real property situated in Omaha, Nebraska, described in Paragraph V of the first cause of action in plaintiff's complaint, and that said property was subject to a mortgage in the sum of $4,136.39.

IV.

Admits that on the 29th day of June, 1926, plaintiff entered into a contract with defendant whereby plaintiff agreed to purchase of defendant, at a price of $5,056.00, the real property described in Paragraph VI of the first cause of action in plaintiff's [16] complaint, and that as a part payment thereon, plaintiff conveyed to defendant the real property described in Paragraph V of the first cause of action in plaintiff's complaint, subject to

a mortgage in the sum of $4,136.39, which conveyance defendant accepted as a payment on said contract in the sum of $2,663.61, and that thereafter, plaintiff paid to defendant the further sum of $1,161.69 on account of the purchase price under said contract.

V.

Admits the allegations of Paragraph VII of the first cause of action in plaintiff's complaint.

VI.

Defendant denies each and all of the allegations of the first cause of action in plaintiff's complaint contained, not hereinabove denied for want of information or belief, or not hereinabove expressly admitted.

Answering the second and separate cause of action in plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

Admits the allegations of Paragraphs I and II of said second cause of action in plaintiff's complaint contained.

II.

Admits that on and prior to the 3d day of March, 1927, plaintiff resided in the city of Omaha, State of Nebraska.

III.

Admits that on the 3d of March, 1927, plaintiff was the owner of the real property in Omaha, Nebraska, described in Paragraph V of the second cause of action in plaintiff's complaint, and that

said property was subject to a mortgage indebtedness of $3,000.00. [17]

IV.

Admits that on the 3d day of March, 1927, plaintiff entered into a contract with defendant whereby he agreed to purchase of defendant, for the sum of $4,000.00, the real property described in Paragraph VI of the second cause of action of his complaint, and as a part payment thereon, conveyed to defendant the real property owned by him as above admitted, subject to said mortgage indebtedness, which conveyance defendant accepted as part payment on the contract of purchase in the sum of $2,800.00; admits that thereafter, plaintiff paid to defendant the sum of $527.20, on account of said contract.

V.

Admits the allegations of Paragraph VII of the second cause of action in plaintiff's complaint.

VI.

Defendant denies each and all of the allegations of the second cause of action in plaintiff's complaint, contained, not hereinabove denied for want of information or belief, or not hereinabove expressly admitted.

WHEREFORE, defendant prays that plaintiff take nothing by his said action, and that defendant have and recover of and from the said plaintiff, its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant. [18]

State of California,
County of Sacramento,—ss.

L. B. Schei, being duly sworn, deposes and says:

That he is an officer, to wit, the resident secretary of Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the within-entitled action; that he makes this affidavit for and on behalf of said corporation defendant; that he has read the foregoing and annexed answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to such matters he believes it to be true.

L. B. SCHEI.

Subscribed and sworn to before me this 9th day of May, 1928.

[Seal] A. E. WEST,
Notary Public in and for the County of Sacramento, State of California.

Service hereof is hereby admitted and receipt of copy acknowledged this 10th day of May, 1928.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Pltf.

[Endorsed]: Filed May 10, 1928. [19]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Satur-

day, the 13th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 13, 1928—TRIAL.

This case came on regularly this day for trial. Martin Welch and Anson H. Morgan, Esqrs., appearing as attorneys for the plaintiff and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant. Mr. Welch moved the Court for permission to amend the caption of the complaint in this case so as to read Sacramento Suburban Fruit Lands Company, a corporation, instead of Sacramento Suburban Fruit and Land Company, a corporation, as heretofore entitled to which Mr. Butler consented *consented* and the Court ORDERED granted. Thereupon the following named persons, viz.:

August Rodegerdts,	Harry Bay,
C. W. Robinson.	Frank Spitzer,
William Lovell,	Samuel E. Mack,
Wallace Gormley,	J. C. Cooper, and
Myrl Livingston,	John W. Daroux,
Jacob Gruhler,	

twelve good and lawful jurors, were, after being duly examined upon their oaths, sworn to try the

issues joined herein. Counsel for both sides made their opening statements to the Court and jury. Frank L. Hayes, Herbert C. Davis, Howard D. Kerr, Charles T. Tipper, Adolph Stern, John V. Kral and Frank Zdarsky were sworn and testified on behalf of the plaintiff and the plaintiff introduced in evidence [20] and filed his exhibits marked Nos. 1, 2, 7, 8 and 9, and the plaintiff rested. John Posehn, Hubert Walter, Lambert Hagel, H. F. Bremer, W. R. Gibson, F. E. Unsworth, Louie Terkelson, James Geddes, Arthur Morley, F. E. Twining and Oscar H. Braughlar were sworn and testified on behalf of the defendant, and the defendant introduced in evidence and filed its exhibits marked Nos. 3, 4, 5, 6, 10, 11, 12, 13, 14, 15 and 16 and the defendant rested. Frank L. Hayes was recalled in rebuttal and testified on behalf of the plaintiff, and Ida Perra was sworn and testified on behalf of the plaintiff in rebuttal and the plaintiff again rested. Defendant thereupon made and filed a motion for a directed verdict, which motion was ORDERED denied. After argument by the counsel and the instructions of the Court to the jury, the jury at 4:50 o'clock P. M. retired to deliberate upon their verdict. ORDERED that the jury be committed to the custody of the U. S. Marshal until such time as they shall have agreed upon a verdict. The verdict shall be signed by the foreman and sealed in an envelope and kept in the custody of the foreman, and the jury shall report its verdict to the Court on Monday, October 15th, 1928, at ten o'clock A. M. [21]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 15th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—OCTOBER 15, 1928—TRIAL (RESUMED).

The parties hereto and the jury impaneled herein being present as heretofore the trial was thereupon resumed. The jury was thereupon asked if they had agreed upon a verdict and through their foreman answered in the affirmative, and thereupon presented a sealed verdict, which was opened in the presence of the jury and read and which verdict was ORDERED recorded as follows, viz.:

"We, the jury, find in favor of the plaintiff and against the defendant and assess the plaintiff's damages at $3,000.00.

Dated: October 13th, 1928.

A. J. DRYNAN,
Foreman."

and the jury being asked if said verdict is their verdict, each juror replied that it is. ORDERED

judgment be entered herein in accordance with said verdict and for costs. FURTHER ORDERED that Juror Samuel E. Mack be excused until Tuesday, November 13th, 1928, at ten o'clock A. M., and that the eleven other jurors in attendance this day be excused from further attendance upon this court. [22]

[Title of Court and Cause.]

VERDICT.

We, the jury, find in favor of the plaintiff and against the defendant and assess the plaintiff's damages at $3,000.00.

A. J. DRYNAN,
Foreman.

Dated: October 13th, 1928.

[Endorsed]: Filed at 10 o'clock A. M., October 15, 1928. [23]

In the Northern Division of the United States District Court for the Northern District of California.

No. 485—LAW.

FRANK L. HAYES,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS CO., a Corporation,

Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 13th day of October, 1928, being a day in the October, 1928, Term of said Northern Division of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, Martin Welch and Anson H. Morgan, Esqrs., appearing as attorneys for the plaintiff, and J. W. S. Butler and E. P. Kelly, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with on the 13th and 15th days of October, 1928, in said term and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury, the jury having subsequently rendered the following verdict, which was ORDERED recorded, to wit:

"We, the jury, find in favor of the plaintiff and against the defendant and assess the plaintiff's damages at $3,000.00.

Dated: October 13th, 1928.

A. J. DRYNAN,
Foreman."

and the Court having ORDERED that judgment be entered in accordance with said verdict:

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,— [24]

IT IS ORDERED AND ADJUDGED that the plaintiff, Frank L. Hayes, do have and recover of and from the defendant, Sacramento Suburban Fruit Lands Company, a corporation, the sum of Three Thousand ($3,000.00) Dollars, and for costs taxed at $22.50.

Judgment entered this 15th day of October, 1928.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [25]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, for the Northern District of California:

Now comes the defendant, Sacramento Suburban Fruit Lands Company, a corporation, by its attorneys, and respectfully shows:

That the defendant, feeling aggrieved by the verdict and judgment thereon in said cause rendered on the 15th day of October, 1928, in favor of plaintiff and against defendant, for the sum of Three Thousand ($3,000.00) Dollars, damages, with costs amounting to Twenty-two and 50/100 ($22.50) Dollars, hereby petitions the Court for an order allowing the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors

filed herewith, and that a citation be issued as provided by law, and that a transcript of the record upon which said judgment was based be sent to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings in this court be suspended and stayed until the determination of the appeal, and that an order be made fixing the amount of surety which said defendant shall give upon this appeal.

Dated: November 24th, 1928.

J. W. S. BUTLER,
EDWARD P. KELLY,
Attorneys for Defendant. [26]

Service hereof is hereby admitted and receipt of copy acknowledged this 24th day of November, 1928.

MARTIN I. WELSH,
A. H. MORGAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 24, 1928. [27]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the above-entitled cause, and makes and files the following assignment of errors, upon which it will rely in its prosecution of the appeal from the verdict and the judgment thereon, herein made and entered on the

15th day of October, 1928, in favor of the plaintiff, and against this defendant:

I.

The Court erred in overruling the defendant's demurrer to the complaint filed in the above-entitled cause.

II.

The Court erred in refusing to grant defendant's motion for an instructed verdict, as follows:

"Mr. BUTLER.—I would like to make a motion for an instructed verdict upon the following grounds:

(1) That the evidence is insufficient to show [28] that defendant deceived and *defraud* plaintiff in the making of the contract referred to in plaintiff's complaint for the purchase by plaintiff from defendant of the tracts of land referred to, or either of said tracts.

(2) That the evidence is insufficient to show that the defendant misrepresented the quality or the character of the land purchased by plaintiff from defendant, or the value thereof.

(3) That the evidence is insufficient to show that plaintiff has been damaged by any act on the part of the defendant.

(4) And, further, upon the ground of the previous inspection by the plaintiff and the opportunity to discover the conditions.

The COURT.—The case is based on alleged false representations that the land was well adapted to commercial orcharding. Of course, the testimony

will have to show that. Our own common sense indicates that it is not an easy matter for a man to go out and look at the ground and see these things. It might require experts to tell it. We have had experts here and even the experts differ about it. The Court is of the opinion that the evidence is sufficient, if the jury accept it and render a verdict for plaintiff, to sustain it. Therefore, the motion will be denied.

Mr. BUTLER.—Exception."

III.

The Court erred in instructing the jury as to the representations alleged to have been made by defendant as follows: [29]

"Coming now to what is necessary to appear in this case before the plaintiff is entitled to a verdict: First, he must prove to you that the representation was made to him by the defendant through its agent. Of course, the defendant corporation can speak only by agents; it has no body or soul of its own, no mouth to speak; all corporations speak through their agents. Its agent is not only the man who spoke for it, but it is the advertisements, the literature it puts out, for, indeed, that literature is prepared by some of its agents. That is the way a corporation speaks. The complaint says that the representation was made to the plaintiff, both by these written books and by the agents of the defendant with whom he dealt. He testified he first fell in with Newlands, down in Omaha, and that Newlands said he had seen all this land, and that it was

very rich and fertile, and highly productive land, he knew the soil, and the products, and he would show him the literature if he would come to the office. He went to the office. He met Newlands and Gibson there, and they both told him that this land in Rio Linda was well adapted to the successful growth of deciduous fruits commercially. The plaintiff also said he read these two books, and that therein he finds those statements. They are in the yellow book, Gentlemen of the Jury, there is no question about that, at all; there is no reasonable interpretation of this book other than that it represents that the lands in Rio Linda are well adapted to successful orcharding commercially. And, as a matter of fact, the defendant's counsel, in the final argument, says they stand on the book. Well, they must stand on it, Gentlemen, because it is their book, and the green book also, and that they [30] maintain the truth of those representations. So if the plaintiff saw this book, and he says he did, he says they gave it to him in Omaha; Gibson appears on behalf of defendant and says that he has never had that book. I did not understand that plaintiff said he got it from Gibson. Maybe Newlands gave it to him. If he had that book and read it before he made the first contract, it is wholly immaterial who it came from, because the defendant gave it out as advertising to impress the person into whomsoever's hands it might fall. The representation was there, and he has a right to count upon it. He says, further, that one of the agents said the same thing; in fact, he mentioned several

of them as having said it. He says that Schei made that statement, Braughler made it, Newlands, and Gibson, and McNaughton. Gibson and Braughler have taken the stand and said they did not; the others have not been brought to deny what the plaintiff has said in that regard. You may ask yourselves the question, Why should not the agents have made the representation when the company was issuing its pamphlet to the same effect? If you are merchants and you send out your advertising to bring in customers, do you hesitate to repeat orally to your customer what you represent in your advertising? That is one way by which you might arrive at the determination whether the plaintiff is truthful in that respect, or the two witnesses for the defendant, who alone deny it, Gibson and Braughler. But, as I said to you, it is in the book, and that is enough for the plaintiff's case, if he read it before he entered into these bargains, and he says that he did, and it is for you to say whether or not he did." [31]

IV.

The Court erred in instructing the jury on the question of the falsity of the representations alleged to have been made by defendant to plaintiff.

V.

The Court erred in instructing the jury on the question of defendant's knowledge of the falsity of the alleged representations, as follows:

"The next step is, did the defendant know that that it was false? As I say, having found it false,

if you do, then the next step for you to determine is, did the defendant know it was false, or in reason ought he to have known it, or did it make this assertion positively, which is the equivalent of knowledge in the eyes of the law. If it did not know it, why shouldn't it have known it? It had handled these lands and dealt with them for fourteen years before it sold this land to the plaintiff. It had been advertising them as fruit lands well adapted to orcharding. Its own name indicates its purpose—Suburban Fruit Lands Company—not Suburban Poultry Lands Company. It had its experts,—its horticultur*al*ists and others, and why wouldn't it know? It undoubtedly had access to chemists. Shouldn't it have known if it did not know? Furthermore, it makes this assertion positively, taking the book for it, and taking the plaintiff's statements, if you do, as to what the agents told him. When a company or a man asserts positively that a thing is adapted to this or to that, is proven to be adapted to this or to that, he is bound to have the knowledge, and the law will not hear him to deny it. It is to be inferred that if it was false he knew it was false. In legal contemplation, it is the equivalent." [32]

VI.

The Court erred in instructing the jury on the question of defendant's intent to deceive the plaintiff, as follows:

"If you believe from the greater weight of the evidence that the defendant knew it was false, or should have known it, or made a positive assertion,

that infers knowledge, and then you proceed to the next step, and that is, did the defendant make this statement with the intent that the plaintiff should believe it and rely on it, and enter into the bargain to buy the land? Why did they put out advertising but to have the prospect believe it and come in and act on it and deal with them and buy? That is common sense. Remember that the law is not much more than common sense. Sometimes it is not as good as common sense. You can act pretty well on your common sense in dealing with these problems. What did these agents make that statement for? What was the book put out for, except to have the statement believed? So no reasonable person could come to any other conclusion, Gentlemen, than that the defendant wanted the plaintiff to believe those statements, and to act upon them and buy the land. The defendant, speaking through its agents, need not have in mind the gross idea, we will cheat, defraud, and deceive the plaintiff. No. All the intent necessary to impose liability upon the defendant is that it put out this advertising with the intent that it would be believed, that its agents made the statement with the intent that they would be believed and relied upon by the plaintiff, and acted upon by him in entering into the bargain." [33]

VII.

The Court erred in instructing the jury on the question of plaintiff's reliance on the alleged representations, as follows:

"So if you do find by the greater weight of the evi-

dence that the defendant had this intent to influence the plaintiff to buy the land, then you come to the next step, and that is, did the plaintiff believe it, and was he induced, in whole or in part, by reason of that, to buy the land. In asking yourselves that question, whether the greater weight of the evidence in respect to it with the plaintiff, remember where the bargains were made, down in Omaha is where it started. He was a railroad brakeman. He did not know anything about California, or California fruit lands, or their values, or the method of growing fruit, or acquainted with the fruit industry—taking his statement for it, and there is nothing to the contrary, and that sounds reasonable. He says he believed what he was told by the agents. He says he believed the agents and he believed the representations in the book. Ask yourself why shouldn't he believe it in his condition? He was dealing with experts; the defendant held itself out as having expert knowledge. It advertised that it had experts—horticultur*al*ists, and the like. Now, it does not necessarily mean that you have to be a college graduate in order to be an expert. One of the witnesses testified here that he had not been through college, but that he was a horticultur*al*ist, a horticultural expert. It is not always necessary to have a college degree to have expert knowledge. The plaintiff visited the land before he made his first bargain. Remember, again, what he was, his ability, his occupation. He says he [34] was taken out on the land by Braughler, first. I think he did say that he was on the land a little while,

two or three hours, and Braughler came around and showed him two or three places, and took him somewhere else, up to Fair Oaks and elsewhere, and showed him lands. Finally, the plaintiff went to Oakland. According to his statement, he had not seen any of these lands which he afterwards purchased. He came back from Oakland and went out two or three times with the same agent of the defendant—Braughler, again, I think, or with some agent of the defendant, and he says that he was on this first lot that he purchased. He bought two lots. He was on the first one only, and he gave it a casual looking over; he did not know anything about soil, or California lands, or fruits, and believing what the defendant told him was true that is all the investigation he made, and he did not discover that the representations were false, if you find they were false. Then he went back to Omaha and bought the first tract. He paid $4,000 for ten acres. You will treat it, Gentlemen, as though he has paid all the money. He has, in legal contemplation, *paid the* land. He gave his note and mortgage. Nobody knows where the note is. That is not in issue here. It will be paid eventually, that is to say, if you render a verdict for plaintiff that will be an offset in the judgment, that is, providing the defendant has the note. So you treat the case, in your consideration of it, just as if he paid the full amount. The pleadings show he paid nearly all of it. It was in June, 1926, he bought the first ten acres. In March, 1927, he bought a second piece for the same amount of money, ten acres, at

$400 an acre. He says Gibson solicited him. It does not make [35] any difference who solicited him; that is not important. Do not be diverted by little side issues in the case, except as they may affect the credibility of a witness. It does not matter whether the plaintiff hunted them up and bought the land, or whether they hunted him up. The only question is was he induced *by* buy by false representations to his damage? Well, anyway, he bought the other ten acres, and then he came out here."

VIII.

The Court erred in instructing the jury on the question of damage, as follows:

"Then the next step would be, it must appear that he was damaged. That, again, is an important matter. If the land was actually worth $400 an acre, no matter how many false representations were made to plaintiff, he would have received as much in value as he paid for it. There is no legal damage, unless the land was worth at that time less than what he paid for it. So you are to determine, then, what is the value of the land. If you believe it was worth $400 an acre, then, of course, the defendant is entitled to your verdict. If you find it was worth less than $400 an acre, then the plaintiff is entitled to a verdict for the difference. You understand that. If it was worth $100 an acre, he would be entitled to a return of $300 an acre. If he gave that much money for something he did not get, he should have it back. The defendant is not entitled to keep it. If it was worth $200 an acre, he would be en-

titled to a return of $200 an acre. You will allow him the difference between what you find the land to have been worth when he bought it, as that is the time of the test, and what he paid for it, which is conceded to be $400 an acre." [36]

IX.

The Court erred in instructing the jury in relation to the absence of Harris, Wanzer, Holmes and Fletcher, as witnesses. This portion of the charge reads as follows:

"Mr. Morley testified to his efforts on nearby land in Arcade. He tells you about other orchards, Fletcher, Wamser, Harris, and Holmes, all nearby, that they had heavy crops. In his opinion it would grow successfully. These men that he mentioned, he says, had commercial orchards. It would have been more enlightening to you and of more value if the defendant called these men and let them tell you about their dealings with this land of theirs. They could have given you figures. It would not be the mere statement of somebody else that they looked good, or they produced a heavy crop, or the like. The defendant has not called them. You may take Mr. Morley's testimony in respect to it for as much as you think it worth, and no more. There is a rule of law that if a party produces weaker evidence when stronger evidence is available to him, the jury may take that into consideration in determining how much weight you will give to the weaker evidence. The men who own the orchards and grow the orchards would be better able to give

results than some passerby or some caretaker who does not know the results through a series of years of handling the orchard. It is for you, however, to determine the weight to be given to any particular piece of evidence before you."

To all of which defendant duly excepted.

WHEREFORE, defendant prays that said judgment be reversed and held for naught, and that defendant be restored to all which it has lost by reason of said verdict and judgment.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND, and
EDWARD P. KELLY,
Attorneys for Defendant. [37]

Service hereof is hereby admitted and receipt of copy acknowledged this 24th day of November, 1928.

MARTIN I. WELSH,
ANSON H. MORGAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 24, 1928. [38]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 13th day of October, 1928, the above-entitled cause came regularly on for trial before Hon. George M. Bourquin, Judge of said District Court, and a jury impanelled and sworn to try said cause and the issues presented

by the complaint of the plaintiff and the answer of defendant, plaintiff appearing by his attorneys, Martin I. Welsh and Anson H. Morgan, and the defendant by its attorneys, J. W. S. Butler and Edward T. Kelly; and thereupon the proceedings taken, the evidence given, the objections made, the rulings thereon and the exceptions thereto were as follows:

TESTIMONY OF FRANK L. HAYES, ON HIS OWN BEHALF.

FRANK L. HAYES, plaintiff, as a witness on his own behalf, testified:

I am a brakeman for the Southern Pacific, and have been engaged in railroading for about eighteen years. I was in that occupation in Nebraska from 1915 to 1926. I never had any experience in raising fruit in California. Prior to 1926 I was not acquainted with the fruit industry of California. At that time I knew nothing [39] about California lands.

In Omaha, Nebraska, I met Mr. Newlands, who solicited me to purchase fruit lands in California. Mr. Newlands was sales agent for the Payne Investment Company in Omaha, representing the Sacramento Suburban Fruit Lands Company of Rio Linda, California. I had often met Mr. Newlands, and one day I told him I was planning on going to California for a vacation. He wanted to know if I had noticed the Payne Investment Company's advertisement in the paper regarding Rio

(Testimony of Frank L. Hayes.)

Linda fruit land for sale in California. I said I had noticed them, and told him I was favorably impressed. He said, "Well, I have been out to California. I went out there on a business trip, and I have inspected the lands, and I am fully acquainted with the character of the soils and the production and the climate, etc., and while I was out there I have taken some photographs of the landscape—scenes on adjoining lands of the Rio Linda Colony. We also have some literature, and if you will come up to the office we will be glad to show it to you."

This book is similar to the literature referred to. I read it and believed what I read.

(The book was offered in evidence as Plaintiff's Exhibit 1.)

I recognize this booklet. I read it and believed what was in it.

(The booklet was offered in evidence as Plaintiff's Exhibit 2.)

After I received this literature I read it over, but not thoroughly. Later I made preparations to come to California, and when my pass came I went to the office and told them I was going to California the next day. They said they would give me a letter of introduction to Mr. Schei. They said, "When you stop off at [40] Sacramento on your way to Oakland you can go out to the colony and see our land." I got this letter and started for California.

I arrived in Sacramento early in the morning,

(Testimony of Frank L. Hayes.)

and after breakfast and waiting I went directly to the Land Company's office and presented my letter to Mr. Schei. I told him I was from Omaha and was going to Oakland to visit friends, and just stopped off to see their land. Mr. Schei is the gentleman standing up in the courtroom. I told him I wanted to go to Oakland that day, and had not time to go all over the colony, but would take a little run out with them, but wanted to get back here by three o'clock so I could resume my journey to Oakland. They wanted to know what I was interested in. I said "I am interested in fruit lands. I understand that you have some very good fruit land out here that is rich and fertile, and very productive in the growing of fruit in commercial quantities. The Payne Investment Company informed me that this was a big metropolis, the capital of the State of California, and that it had wonderful facilities, a rail center and steamship lines and big markets." They represented the land to be rich and fertile, and very productive, and would produce fruit in commercial quantities. They took me out to the Rio Linda Colony. First they took me all around the city, to the Capitol grounds, and took my picture there. Afterwards they drove me around the city, and then went to the colony. Out there he said, "I want you to go out and meet a couple of our neighbors." I said, "I have not got time to run around and talk with your neighbors. I want to get back here by three o'clock." He said, "Well, I just want to you to meet a couple of

(Testimony of Frank L. Hayes.)

them." That was Mr. Schultz and Mr. Wilson. Mr. Wilson had a fairly nice place down there. He is a Californian. They introduced me and told him I was from Omaha. [41]

Mr. WELSH.—Q. In the conversation with Mr. Wilson and the other gentleman, in the presence of Mr. Schei, was anything said about fruit lands?

A. Yes.

Q. What did they say?

A. They said that it was a new colony opening up, and it was being subdivided and sold to the people for fruit raising, fruit farming. I says, "How much land have you got, Mr. Wilson?" He said he had twenty acres. I said, "I don't see any fruit growing here." He said, "I am going to plant it out later; this is a new colony just opened up, and the orchards are just being planted out, it takes time to plant out orchards. I am interested in the chicken business now. I come from Folsom over here, and I like it much better over here than I do at Folsom, and I am—"

WITNESS.—From Wilson's place we went to Mr. Schultz's place, then detoured and brought me back to town.

Q. Did you subsequently have a conversation with Mr. Schei? Did you have a conversation with him after the time you went out to Mr. Wilson's place?

A. After I came back from Oakland I called at the office. That was about ten days later. I said, "Now, I have come back from Oakland; I have plenty of time to go out through your colony. I

(Testimony of Frank L. Hayes.)

would like to see the best piece of fruit land you have left for sale." I said, "When I see that I don't want to see any more, there is is no use of my taking up your time and my time running all over the colony."

WITNESS.—He called in Mr. Braughler and said, Mr. Hayes wants [42] to buy some fruit land. Show him Lot Seventy-eight in Rio Linda Subdivision Six." I went out to the Rio Linda Colony and took a casual view of the place. I did not examine it or anything like that. He said, "This, Mr. Hayes, is our choicest and best lot we have left for commercial fruit raising." Mr. Braughler is the gentleman standing over there in the courtroom.

Q. What else did he say to you when he had you out at Lot 78?

A. I said, "Why is this your choicest and best piece of fruit land that you have left?" He said, "Well, for this reason, Mr. Hayes, this particular lot borders on that stream down there." There was a ditch going through, a mother-nature ditch. He said, "You have a drainage there." Well, that sounded good to me. I thought that was pretty good, and it looked fairly good to me, the lay of the land, and everything. I said to him, "How about that ditch,—does that flood in the rainy season, does it flood or overflow in the rainy season?" He says, "No, Mr. Hayes, you may rest assured that ditch don't overflow in the rainy season, and, take my advice, and buy this lot and you will never

(Testimony of Frank L. Hayes.)

regret it." After giving a casual view to it and walking around on it a little bit, I said, "Very well." I said, "How does it come there are not any orchards growing over here? It looks all barren; I don't see any orchards growing around this vicinity." He says, "Well, this place is just being settled up, Mr. Hayes, and the new settlers have not had time to plant any new orchards, but it will be planted, and when you come back here you won't know this place." I said, "You take me and show me where there are some orchards growing, I want to see them." He said, "Very well, I will take you over to the Fair Oaks Colony and Citrus Heights, and Orangevale. I said, "I want to go to Roseville this afternoon and see the trainmaster, and [43] see what the prospects are of getting a job before I come out here." He says, "That is right on your way to Roseville, and you can stop off and see the Fair Oaks District"—

WITNESS.—Mr. Braughler took me to the Fair Oaks district to see the orange trees and the lemons. I saw Mr. Hoffman's citrus ranch there, and it looked very fine. Mr. Braughler pointed out the nice fruit orchards that were there and said, "Mr. Hayes, you see what is growing here. You can grow the same thing in the Rio Linda Colony, and it won't be many years before it looks over there like it does over here." I was much impressed with the country over there. It appealed to me. It looked very rich and productive, and I believed him. I believed what he told me was true about

(Testimony of Frank L. Hayes.)
the fruit in the new orchards being planted in Rio Linda. He said it would look the same as I saw in Fair Oaks.

I afterwards purchased Lot Seventy-eight, in Omaha, on June 29, 1926. It contained 12.64 acres. I bought it on the representations that were made to me by Mr. Braughler and Mr. Schei and Mr. McNaughton, their horticultural adviser. I bought it on the representations of the literature, and the representations that were made to me by their agents; that it was especially adapted for the raising of commercial fruit, such as deciduous fruits. I paid four hundred dollars an acre for it, partly in cash and partly in trade. I had an equity in two houses and lots. They allowed me fifty-eight hundred dollars for my home. I bought another lot from the same company on March 3, 1927. They solicited me for that also. Mr. Gibson, the city sales manager of the Payne Investment Company at Omaha, Nebraska, called me up on the telephone and said, "Mr. Hayes, I want you to come down to the office; you have been wanting [44] sufficient ground to raise a commercial orchard on; you have to have more than ten acres; you should have twenty acres, at least, in order to raise fruit in commercial quantities." He says, "This land is selling very rapidly, and going very high, and you should get this other lot while you have a chance; it is all sold around you; this joins your land." So I came down to the office and entered into the second transaction.

(Testimony of Frank L. Hayes.)

I paid four hundred dollars an acre for that. It contained ten acres, a total of twenty-two and sixty-four hundredths acres on both pieces. I did not subsequently inspect the land. I could not inspect it. I just gave it a casual view when I was on my visit.

When I came out to establish my residence in California I went out and inspected it. Mr. Schei sent Mr. Braughler with me. We went out in the automobile, and as we passed out the rear of his office I noticed a big long auger, and asked him what that was. He said that that was a land auger, to test land with. I asked him to put it in the car so I could test my land with it. He said, "This is too dull. There is no use taking that out there." I said, "Put it in the car anyway; I want to use it." So we drove out to inspect my land. The auger was so dull I could not do anything with it, so I did not make any boring. Then I walked over both pieces and gave it as much of an inspection as I could by eyesight. Then I went down to look at this ditch that Lot 78 borders. I saw a big hump in the bottom of the ditch, and I thought it was a rock. I asked Mr. Braughler what that was, and he said, "That is hard-pan." I said, "How thick is it?" He said, "It varies in thickness and depth." I said, "Is my land underlaid with that?" "Well," he says, "Yes, to a certain extent." I said, "Is it all underlaid with it?" He said, "Well, I would not say it is all." I said, "How thick [45] is it?" He said, "It varies in depth and different

(Testimony of Frank L. Hayes.)

thicknesses." I said, "That is awful hard, will roots penetrate that?" He said, "Yes, when it rains and softens up the ground, or if water penetrates it it softens the hard-pan up and it will not affect roots unless it is thick, if you find a thick place I advise you to blast. Then," he says, "you have drainage and you won't have any trouble in growing fruit-trees." That sounded reasonable to me, and I dismissed it from my mind, I dismissed from my mind all doubt that it was injurious to my land. So he says, "Now, Mr. Hayes, there is no use of your looking any further; you have the best piece of ground we have left, and as you have both pieces together I advise you to keep it together." I said, "All right, I agree with you." So I did not exchange my land, I kept what they sold me. I believed what they told me. I did not believe the hard-pan was injurious to my land. I did not have any idea of the thickness, and never knew what hard-pan was until I came out here and saw it later on. I dismissed it from my mind. Then later I got a job for the Southern Pacific here and went to work. I worked over here at Roseville.

WITNESS.—I inspected the land again about the 15th or 20th of February, 1928. I borrowed an auger and made some borings on both of my pieces. I found hard-pan everywhere I bored, and I thought I was stung. I was not satisfied. I wanted further proof, and got a land expert, Mr. Davis, to examine my land thoroughly.

(Testimony of Frank L. Hayes.)

Cross-examination.

I borrowed that auger from Mr. Herbert Walter, a real estate man in this city. I did not make any report to him about [46] the depth of soil I found when I came back after having bored my land. I did not make any statement to Mr. Walter when I returned the auger that I was agreeably surprised that my land was from thirty inches to six feet deep along the creeks. I had nothing to measure it with and I did not make any such statement.

Mr. Newlands was the man in Omaha with whom I dealt when I made my first purchase. Mr. Gibson closed the deal. I had some negotiations with Mr. Gibson. He made representations to me about the ability of this land to grow fruit in commercial quantities. He told me, "That this is the richest land in the world; that is in the Sacramento Valley; that it is very rich and fertile and productive, and it will grow anything except bananas, and we ain't got no bananas." All that was said by Mr. Gibson. He told me that it would grow fruit in commercial quantities. He used the expression "in commercial quantities." I don't know that Mr. Newlands used that expression. He said it would grow fruit commercially. He said the same as in the literature. Mr. Schei told me it would grow fruit commercially and Mr. Braughler told me that it would grow fruit commercially. These men I dealt with used that same expression, and that same term, that it would grow fruit commercially.

(Testimony of Frank L. Hayes.)

Mr. BUTLER.—Just for the sake of the record, these are the two contracts, Mr. Welsh, and I would like to introduce them in evidence. Will you look at them, please?

(The contracts were introduced in evidence as Defendant's Exhibits 3 and 4.)

Mr. Gibson gave me the green booklet I have identified when I bought the second piece in the year 1927. It is not a fact that I received one of these booklets before I bought the first piece. I received the other book from Mr. Newlands. I am certain [47] he gave me this book before I purchased the first piece. I had that book before I made my first purchase. That is the Fourth Edition, the Yellow Book, and the second book was delivered to me before I made my second purchase. When I received this book from Mr. Newlands before I made my first purchase I took it home and read it, and before I made my second purchase I took the other book home and read it through. I thought I understood it. My purpose in making my first purchase was to go into the business of raising fruit in commercial quantities. I had no idea whatever when I came here of engaging in the poultry business. They talked poultry to me, but I told them I was not interested in poultry. I never had any idea from the time I first took up these negotiations of going into the poultry business.

I endeavored to purchase another tract of land

(Testimony of Frank L. Hayes.)

from the Sacramento Suburban Fruit Lands Company.

Q. Is it not a fact that in making your second purchase you insisted upon buying that piece of land, that second ten acres, over the objection of Mr. Schei and Mr. Gibson, and the Sacramento Suburban Fruit Lands Company, and the Payne Investment Company?

A. How could I? I bought my land back in Omaha. How could I? I was not dealing with Mr. Schei. I was dealing with Mr. Gibson.

Q. Is it not a fact that in making that purchase, you purchased that second piece of land against the advice of Mr. Gibson?

A. No. I bought it on their representation. They solicited me and advised me to buy that land.

Q. Is it not a fact that you endeavored to purchase an additional tract of two and a half acres, and that was absolutely refused you by Mr. Gibson? [48]

A. They wanted to sell me that piece, but I would not buy it.

Q. Let me ask you to identify this letter. Is this in your handwriting? Did you write that letter?

The COURT.—Answer if you did or not. You know your own writing.

A. Yes, that is my handwriting.

Mr. BUTLER.—Q. And that is your signature at the bottom of that letter?

A. Yes.

(Testimony of Frank L. Hayes.)

Mr. BUTLER.—I offer it in evidence. It reads as follows:

Omaha, Nebr June 30—1926.

"Sacramento Suburban Fruit Land Co.

Dear Mr. Schei:—

On my arrival back home I decided to purchase 10 acres or more of your land providing the Payne Investment Co. would arrange to accept my equity on the two Places here in Omaha and apply it on the Lot #78 Rio Linda Subdivision #6, consisting of 12.64 acres, that would clean me out back here and would give me $2000 dollars to come out to Sacramento to start into business on, and could get a good start to settle down and improve the piece of ground. I figure it would take $2000 to start up with and with Mr. Lydings instructions could get the right kind of a start otherwise it would be unsuccessful referring to our previous interview in regards to this matter you made notations and promised me that you would take the matter up and write to Mr. Gibson and see if you could arrange it with Payne Investment Co. to accept the proposition—clean me up back here and start me out to Sacramento with sufficient money to do business on." [49]

(Defendant's Exhibit 5.)

Q. At this time you had not signed your contract, had you, Mr. Hayes?

The COURT.—The contract shows for itself. Well, perhaps it does not, because sometimes they

(Testimony of Frank L. Hayes.)

are not dated. Perhaps you had better ask the question.

Mr. BUTLER.—Q. Your contract for the purchase of the first lot is dated the 29th day of June, 1926. Did you sign that contract on the date it bears?

A. I signed a purchasing contract.

Q. You mean your application? A. Yes.

Q. But the contract was made at a later date?

A. The purchasing contract is the contract, itself.

Q. The main contract here is dated the 29th of June, 1926.

A. But I am bound when I sign the purchasing contract.

The COURT.—Don't argue with the witness, Counsel. Proceed.

Q. Who was Mr. Lyding?

A. The poultry adviser.

Q. Now, let me ask you, did you receive from the Sacramento Suburban Fruit Lands Company a letter from Sacramento, from Mr. Schei, of which this is a copy? (Addressing Mr. Welsh.) Have you the original of that letter, Mr. Welsh?

Mr. WELSH.—I don't know, Mr. Butler. If I have I will be very glad to produce it.

Mr. BUTLER.—It is dated July 7, from Mr. Schei to Mr. Hayes.

Mr. WELSH.—I have not got it here, Mr. Butler. I may have it in the office. If I have I will be glad to produce it.

(Testimony of Frank L. Hayes.)

A. Yes, I received that letter.

Mr. BUTLER.—Q. While I am reading this, will you look [50] over this one that I now hand you and tell me, when I ask you, whether you received that from the Payne Investment Company? I offer this letter in evidence. It reads as follows:

"Sacramento, Calif., July 7, 1926.

Mr. Frank L. Hayes,
1620 Victor Ave.,
Omaha, Nebr.

Dear Mr. Hayes:

We have received your recent letter just before the holidays but have not had the time to answer it until today. I note that you have been making a deal with our Company for Lot 78 and am mighty glad of it. I am sure you will be pleased with this land.

You also ask if I have written to Mr. Gibson to intercede for you. I certainly did immediately after you left, suggesting just what I told you that they make a deal with you on one of your properties. I also suggested the idea that you would like to have them buy back the property that you recently purchased from them. As I explained to you, it would be a very unusual business procedure for them to buy back the property, but felt sure that if you will list it with them they would make a special effort to resell the property and if possible make you a little profit on it, as from your statement evidently the property was very cheap.

(Testimony of Frank L. Hayes.)

Of course the Payne people make their own deals and I could not go any further than to merely transmit your request, but, as I told you, personally I would think it would be rather difficult for them to handle the matter that way." [51]

(Defendant's Exhibit 6.)

Q. Now, that letter that you have there, did you receive that from the Payne Investment Company, the original of which that is a copy?

A. I never received it.

Q. You never received it?

A. No, sir, I never received it.

Mr. BUTLER.—Mr. Welsh, I will ask you if you find the original of that letter, and if so will you kindly produce it?

Mr. WELSH.—I will be very glad to.

WITNESS.—I arrived here, I think, in the latter part of April, 1927. From the 29th of June, 1926, the date of my purchase contract, until April, 1927, I did not come back to visit California. When I arrived I did not go out on my property and start to improve it. I secured work elsewhere. I have not attempted to improve either of those parcels of land. I did not have sufficient money. I have never made any attempt to plant an orchard on either of those parcels. I have never built a house or dug a well, or stuck a pick in the ground.

I claim that I have been defrauded financially. The Payne Investment Company and the Sacramento Suburban Fruit Lands Company took my home away from me.

(Testimony of Frank L. Hayes.)

Q. To whom did you deed your home—to the Payne Investment Company? A. Well, they—

Q. Who did you deed your home to? You know that you made a deed, don't you?

A. I got the money and bought the land, and they assumed it. [52]

WITNESS.—I believe that I turned my home in to the Payne Investment Company at a valuation of fifty-eight hundred dollars. There was a mortgage of something like forty-one hundred dollars on it. I do not claim that I have been defrauded because I conveyed my home to the Payne Investment Company. After I bought my land and found it was no good for anything, that is the reason why I determined it. Common sense and reason tells me it is no good. I see nothing growing out there yet. That is not the only basis for saying my land will not produce anything, because I got expert authority on that. I got the authority of a land expert, Mr. Davis, to tell me what it is good for.

Q. Is that the only reason you know the land will not produce, because Mr. Davis told you so?

A. It might produce vegetables and things like that, but I am talking about fruit.

WITNESS.—I have been around the colony to see whether or not there were any fruit-trees growing in Rio Linda. I went over to Terkelson's place. He had a fairly good place, but he had deep soil and an old orchard, several years old. I did not visit any other in particular. I just saw them as

(Testimony of Frank L. Hayes.)

I drove by. I saw some fruit-trees, a few fruit-trees, around Mr. Wilson's place. I visited Mr. Wilson's place in company with Mr. Braughler. Mr. Schei was never on a trip with me. Mr. Braughler took me out. Mr. Schei was not with me on either one of those tracts or any of these trips. Mr. Wilson told me he had twenty acres of land, as far as I can remember now. That was about three years ago. I saw some chickens [53] on Mr. Wilson's place. At that time he had a very large chicken plant there. I did not go through the plant. I was just in the yard for a short time. I did not ask him if it was his intention to go into the business of raising fruit commercially. He said he was going to plant out his twenty acres in fruit later on, but he did not say for commercial purposes. He did not say how much of that land he intended to plant out to fruit, but he told me he was going to plant it out for fruit. When I went to Mr. Schultz's place, Mr. Schultz was there. Mr. Braughler drove me from Mr. Wilson's place to Mr. Schultz's place. He took me up to a wire fence and called Mr. Schultz over. He was working in the poultry-house. He said, "This is a prospect from Omaha, Nebraska, and we would like to have you tell him what you know about this country here and how well you have been getting along." So I said, "I am not interested in chickens, because I have no family to care for chickens and I have to work at something else when I come out here for a while." Mr. Schultz did not talk

(Testimony of Frank L. Hayes.)

fruit to me. From that time on he talked chickens. I don't remember that I had any talk about fruit with Mr. Schultz. The subject of the commercial raising of fruit did not enter in the conversation of Mr. Schultz with me. On that first trip with Mr. Braughler, besides the place of George Wilson and Mr. Schultz, we went to Mr. Weibel's place. He was in the fruit business. We didn't visit any other place particularly, just to stop and call and say, "How do you do," or something like that. The people at practically all of the places I visited and stopped were not in the chicken business. None of them were in the fruit business commercially. I visited just a small portion of the colony.

On the second trip Mr. Braughler went out with me. That [54] was after my return from Oakland. On the second trip he took me to look at Lots 78 and 83, and we looked them over. I visited Mr. Neimeister, a settler in the neighborhood. At that time he was in the poultry business. I don't know if he is still in the poultry business. I don't remember if I visited any other places on that trip. It was on the first trip that Mr. Braughler took me to Fair Oaks, Orangevale and Citrus Heights.

Q. Mr. Hayes, I think you said you only had an hour or two on your first trip, that you had to catch the three o'clock train for Oakland.

A. Yes.

The COURT.—He did testify to that, that it was on the first trip.

Mr. BUTLER.—Q. What time of day was it

(Testimony of Frank L. Hayes.)

you arrived here in Sacramento when you came here first?

A. That was about 4:30, I believe.

The COURT.—No, Counsel, I will correct that. It was on the second trip, after he came back from Oakland.

Mr. BUTLER.—That is what I thought, your Honor.

Q. When did you go to Fair Oaks with Mr. Braughler, was it your first trip, or your second trip?

A. I went to Fair Oaks on the first trip.

Q. All right. What train did you come in on from Omaha?

The COURT.—He may be speaking of the first trip out from Omaha.

A. The first trip from Omaha, yes, sir.

Mr. BUTLER.—Q. You made one trip from Omaha out here, and then you were in Sacramento twice; you stopped here, and then you went to Oakland, and then you came back again. I am mentioning those as the two trips. When you came to Sacramanto the first time [55] from Omaha, on your way to Oakland, you stopped over for a few hours, here, did you not?

A. Yes.

Q. Was it at that time Mr. Braughler took you to Fair Oaks and to Orangevale?

A. He took me over there when I came back from Oakland.

Q. All right. How much time did you put in in

(Testimony of Frank L. Hayes.)

Sacramento when you returned from Oakland, how many days?

A. Mr. Schei rode me around trying to show me the sights of the town, and—

Q. Wait a moment. How many days did you put in at Sacramento on your return from Oakland, and before you went back to Omaha, before you left to go back to Omaha?

A. I believe I was here two or three days after I came from Oakland.

Q. And how many days' time did you spend out in the colony after your return from Oakland?

A. I did not spend my time in the colony.

Q. I say how much time did you spend out there?

A. Mr. Braughler went out there to see a couple of parties, and he took me along with him, and I presume maybe it was a couple of hours on each trip.

Q. How many trips?

A. Two or three trips during the two or three days.

Q. You went out there practically every day, didn't you?

A. Yes, I guess practically every day.

Q. How many times did you visit lots 78 and 83 while you were going out with Mr. Braughler—just the once?

A. Oh, no, he drove me by there once or twice, yes.

Q. He took you up through Fair Oaks, did he?

A. Yes. [56]

(Testimony of Frank L. Hayes.)

Q. And through Orangevale? A. Yes.

Q. And Citrus Heights? A. Yes.

Q. He took you all around that country, did he? A. Yes.

Q. And you talked fruit? A. Yes.

WITNESS.—I did not wish to talk poultry. He talked poultry. He advised me to go into poultry first for an immediate income. He wanted me to take a mortgage on the second piece of land and get enough money to build a house and go into poultry for an immediate income. He said, "You can make more money out here than you can in railroading." He did not tell me I could make more money out of poultry than out of fruit. At Fair Oaks we stopped on the road in front of Mr. Hoffman's citrus ranch. That is by the San Juan High School. He did not show me any hard-pan on the road while he was taking me around through Fair Oaks. He mentioned hard-pan to me when I found it in the ditch. That is when I was in the ditch, and he showed it to me. The subject of hard-pan was discussed at that time, not on this first trip from Omaha, but when I came out here to establish my residence and take possession of my land.

I had never discussed hard-pan before. I read it in the literature, but I never discussed it to any extent. They told me in Omaha that it was a hard clay and when it rains it softens right up and you can take a spade and run right through it. Mr. Newlands told me that. Mr. Gibson told me practically the same.

(Testimony of Frank L. Hayes.)

I don't remember that I visited the place of John Poselm. I don't remember seeing his family orchard or his vineyard. I don't remember that I ever visited the place of Lambert Hagel. I might have drove by. I don't remember seeing his vineyard. I don't know where his place is located. [57]

I know of an orchard down close to the Rio Linda town site on the river on the creek banks. I don't know of any on the high lands. I have not made any effort to find any, because I was not living out there and I had nothing to be out there for.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFF.

HERBERT C. DAVIS, a witness for plaintiff, testified:

I am an agricultural specialist of the firm of Techow & Davis, Engineers and Chemists. I acquired my knowledge by three years' work at the University of California, and practical experience since then. My practical experience covered seven years as manager of the United Orchards Company at Antelope, and I have had my laboratory here for three and a half years.

I am acquainted with Mr. Hayes, the plaintiff in this case. I made an examination of Lots 78 and 83 in the Rio Linda Colony, Subdivision six, for the purpose of determining its quality as to fertility and ability to produce deciduous fruits

(Testimony of Herbert C. Davis.)

in commercial quantities. I have found the average depth of soil there to be twenty-eight inches, underlaid by a dense hard-pan. This is a sample of the hard-pan. It is a sandstone material. It was taken from the ditch that runs along the north boundary of the property, as shown on the map. This is the upper crust of the hard-pan. The general character of the hard-pan in that vicinity is stratified to some extent. There is a coarse, dense hard-pan on top, running from a foot to a foot and a half in thickness. It is underlain by a finer-grained material somewhat softer, but for agricultural purposes it is all practically the same. It ranges in depth from six to forty-eight feet over the colony generally. In that particular locality the Loucks well pit on the adjoining property shows twenty [58] feet of it.

(The sample of hard-pan was offered in evidence as Plaintiff's Exhibit 7.)

This is the map that I referred to. It shows the number of borings made, eighteen in all, and depth of soil in inches to hard-pan, in the two lots, 78 and 83. They adjoin each other. This is a cross-section showing the formation of the hard-pan through the center line of the property. Along the center line it shows the depth to be twenty-two inches, twenty-nine inches, three inches, thirty-six inches, forty-two inches, thirty-six inches. When I refer to inches I refer to the depth of the hard-pan from the surface of the ground, including the clay strata that is right directly on top.

(Testimony of Herbert C. Davis.)

(The map was offered in evidence as Plaintiff's Exhibit 8.)

Q. Did you make a chemical analysis of the soil in lots 78 and 83, Rio Linda Colony, Subdivision No. 6? A. Yes, I did.

Q. State what your findings were.

A. Potash .083 per cent, equivalent to 3,320 pounds per acre-foot. Phosphoric acid .012 per cent, equivalent to 480 pounds per cubic foot. Lime .303 per cent, equal to 12,120 pounds per acre-foot. Nitrogen .210 per cent, equivalent to 8,400 pounds per acre-foot. Humus .29 per cent, equivalent to 11,600 pounds per acre foot.

Q. I will ask you if from your tests of the soil, your knowledge of the conditions out there, and the analysis you made, whether or not the soil content in lots 78 and 83 of Subdivision 6, Rio Linda Colony, is adapted to the raising of deciduous fruits in commercial quantities?

A. No, it is not. [59]

Q. State your reasons why.

A. The first requirements for the production of fruit commercially is depth of soil to permit the proper area for the roots of the trees, the upper three feet of soil being occupied by the feeder roots, and the lower portions of the soil to afford an anchorage, and the storage of moisture, and the proper drainage, so that no excessive water can stand around the roots.

Q. In the event that the hard-pan is blasted for

(Testimony of Herbert C. Davis.)

the purpose of fruit-tree planting, what results in that event?

A. If the hard-pan is not too thick, and is underlain by soil or sand so that in blasting you can make a contact between the surface soil and the looser strata underneath, then blasting can be done successfully. In the case of hard-pan of this nature, where it is so thick, it would not be practicable to try to make a contact clear through to the sand, which is perhaps 20 or 30 feet underneath. Nothing would be gained by blasting. You would blow out a pothole in the hard-pan that would act as a basin and fill up with water in the winter-time, and eventually kill the tree by drowning it out.

Q. What content is necessary for soil in which deciduous fruits can be raised profitably and in commercial quantities?

A. You mean the chemical content?

Q. Yes.

A. This soil is deficient in potash and phosphoric acid. The other materials are satisfactory. It contains about one-quarter the customary amount of potash, and about one-quarter the amount of phosphoric acid that would be considered adequate.

Cross-examination.

I got the sample of hard-pan from the ditch running across the back of the northern boundary of the property. I did not bore [60] the land anywhere to determine the thickness of the hard-pan. I had the well pit on the adjoining property to

(Testimony of Herbert C. Davis.)

examine. I have not made any borings on this particular tract to determine the depth of the subsoil below the hard-pan. I haven't made any borings that went below the surface of the hard-pan strata.

Q. How do you know, outside of your experience outside—in other words, what information have you that blasting in this hard-pan would leave a pothole that would hold the water?

A. My familiarity with that particular type of hard-pan.

WITNESS.—I have made no experiments with this particular type of hard-pan on the Rio Linda Colony to determine that fact. I have never shot off a blast anywhere on the Rio Linda Colony. I have never taken a sample of that particular type of hard-pan and immersed it in water to see whether it would absorb water or not. I have never made any experiments to determine whether or not this hard-pan or the subsoil underneath it, when exposed to the air and elements, would disintegrate. I have seen a lot of it that was exposed to the air. This particular sample has been exposed to the air in the ditch for some time. I took this out of a dry ditch running across the property.

The irregular line on the map on the upper side, marked north, is the creek bed running through the property. I understand it forms the northern boundary.

I went to the University of California to get my education to qualify me as an agricultural expert.

(Testimony of Herbert C. Davis.)

I attended the University in Berkeley in regular session for about a year and a half. After the war I went into business on my own account, and purchased a [61] tract of land planted to almonds near Antelope. I was taught that five-foot rule, wherein I say it is essential that there be at least five feet of soil for the successful growing of fruit-trees commercially, in the University of California. As I remember it, it was taught to me in my class-rooms. It was also taught to me by any number of authorities I have consulted, books and papers written on the subject. I do not recall any dispute of that rule in my search among the authorities, and I had access to the University of California library, and all agricultural records, and I never found that rule disputed, but did find it laid down as a general rule. After a year and a half at the University of California I went into business by purchasing a tract of land planted to almonds near Antelope. The soil on the land I bought was not five feet in depth. It had an average of about four feet, and there was soil there of a shallower depth than four feet. The shallowest of the soils on that tract were a foot and a half, and from there up to fifteen and twenty feet in depth. I don't know exactly the area where the soil was of a depth of a foot and a half, two feet and three feet, but there was quite a lot of it throughout the whole orchard. The average of the soil was less than five feet. The United Orchards Company, of which I was the manager, was a family proposition, consisting of

(Testimony of Herbert C. Davis.)

myself and my stepfather. We owned a hundred and fifty acres, and we farmed some outside of that which we rented. It was not all planted to almonds. Between ninety and a hundred acres were planted to almonds. The rest of it was planted to other fruits and vines and some of it was bare land. The majority of it was planted on soil less than five feet in depth with hard-pan underneath, similar in quality and thickness to the hard-pan in the Rio Linda district; thicker, I believe. [62]

Q. Had that place, to your knowledge, been a financial and commercial success prior to the time you bought it? A. Not to my knowledge, no.

WITNESS.—I did not make any special investigation to determine whether it was or not prior to my purchase. I was familiar with the district and my stepfather had owned property there previously, but had not been successful with it.

I could not say how many acres are devoted to almond culture on hard-pan land in the vicinity of Antelope. There are about two thousand acres of almonds in that district, but there is a lot of it along the creek. It is a recognized almond district in this part of the country. I know of a good many orchards in the county of Sacramento planted on hard-pan land of less than five feet in depth.

Q. Any of them commercially successful?

A. Not to my knowledge.

Q. Would you then say that in the county of Sacramento, east of the Sacramento River, on hard-

(Testimony of Herbert C. Davis.)

pan lands, that there are no successful commercial orchards?

A. I would not say definitely there were none. I don't know of any. All of the orchards I know of on that type of land are not successful.

Q. Is it not a fact that the majority, the large majority of the orchard land, east of the Sacramento district, and in the fruit district of Sacramento County, is hard-pan land?

A. No, I do not believe it is.

WITNESS.— [63] Outside of the river bottoms it is hard-pan land, but the majority of orchards, the successful ones, are along the rivers. I do not believe that the majority of the fruit-growing section of Sacramento County is outside of the river districts. I have never checked it up, but I do not believe it is. That is just an impression I have. It is not based on any check. I don't know of any successful orchards on hard-pan lands.

Q. How about the Fair Oaks and the Carmichael colonies, and Citrus Heights and those fruit-growing district up there? Don't you find any successful orchards in that district?

A. Not in true hard-pan land. In Fair Oaks on the hills, where there is a considerable depth of soil and good drainage, there are certainly successful orchards, but on the flat lands that are essentially the hard-pan lands, there are lots of good trees, sure, but that is all you can say.

WITNESS.—I do not believe it is the fact that that district, comprising the old Cardwell Ranch,

(Testimony of Herbert C. Davis.)

is a hard-pan proposition, the same as Rio Linda, and the depth of the hard-pan through the entire Cardwell Ranch, which comprises Fair Oaks and Orangevale, is of the same character and quality as the Rio Linda district. The rule established for minimum depth as to vineyards is four feet. Vines will not grow successfully, commercially and profitably on less than four feet. They have to have depth of soil.

I am not familiar with the Fresno district. I don't know, as a matter of fact, that there were thousands of acres of vines growing down there on less than three feet of soil. I don't [64] know anything about Fresno. I never investigated that.

I have investigated the Florin district. It is true that thousands of acres of the best Tokay grapes in this part of the country, come from the Florin district on land less than three feet of soil, under peculiar circumstances. There are a great many vineyards in the Florin district on less than three feet of soil that are not successful. I have examined many of those. Also, what little investigation I have made in this district shows that the hard-pan is a somewhat different type and is underlaid quite near the surface with sand. I had occasion to investigate that up near Elk Grove.

Q. Let us get away from Elk Grove and let us stay by the Florin district. The Florin district is deeper than Elk Grove. Have you ever made any investigation in the Florin district?

(Testimony of Herbert C. Davis.)

A. On the unsuccessful orchards, I have been out there several times to see what is the difficulty.

Q. How many have you investigated?

A. I could not tell you offhand. It has been over a period of years in the line of our work.

Mr. WELSH.—I offer this analysis in evidence, as made by the witness.

(Plaintiff's Exhibit 9.)

WITNESS.—I was manager at Antelope for seven years.

TESTIMONY OF HOWARD D. KERR, FOR PLAINTIFF.

HOWARD D. KERR, a witness for plaintiff, testified: [65]

I am a real estate broker in Sacramento and have been engaged as real estate broker in Sacramento for nine years. I have been connected with the real estate business in the county of Sacramento, all together, for twenty-two years. I specialized in country property. I am acquainted with the market value of lands situate in the Rio Linda Colony, and was so acquainted in the years 1926 and 1927.

I have inspected Lots 78 and 83 of Subdivision Six, Rio Linda Colony, to determine the market value of that property in 1926 and 1927. It was fifty dollars an acre. It is all about the same value at the present time.

(Testimony of Howard D. Kerr.)

Cross-examination.

I visited that property the first time yesterday. I was there about twenty-five minutes. I took into consideration in arriving at my figure of fifty dollars an acre on this property, its accessibility to the city. The means of transportation are by automobile. It is between eleven and twelve miles out. There are practically no roads in front of this place. It is six hundred sixty feet to the nearest gravel road, and from that point to the city of Sacramento there is a gravelled road.

In fixing this value I took into consideration the nearness of the city, the nearness to the car line, the schools and the mail delivery. I think it is about two and a half miles to the car lines. I took into consideration the fact that this lot is in a community where the industry is the same throughout the entire district; in other words, where it is a unified poultry district. I did not take into consideration the benefit that comes to a settler in that community because of his opportunity of association in the Rio Linda Poultry Producers Association, or the services that [66] are rendered to the people who have settled out there in the way of expert advice in the matter of their poultry raising. I did not consider that. I figured on the accessibility to water.

I know the East Del Paso Heights. That is situated about three miles from this lot. I was a wit-

(Testimony of Howard D. Kerr.)

ness in the case of Great Western Power Company vs. T. Wah Hing in the year 1927.

Q. At that time let me ask you if these questions were asked you, and if you gave these answers.

"Q. Are you familiar with the lots over which the plaintiff in this case seeks to build a power line?

That was a condemnation suit, was it not, Mr. Kerr? A. Yes.

Q. And you were testifying for the defendant, the Chinese doctor, were you not?

A. I was sent out to appraise the property.

Q. By the doctor? A. Yes.

Q. Now, I will read these questions to you:

Q. Are you familiar with the lots over which the plaintiff in this case seeks to build a power line? A. Yes.

Q. Known as Block 11,. 22, 26 and 27 of East Del Paso Heights. What in your opinion would be the reasonable market value, if sold for cash, of the lots cut up there, during the month of January, 1927, if given a reasonable time to find a purchaser?

A. About $200 per lot on the south side, between that and $250 on the north side."

Did you give that testimony? A. Yes, sir.

Q. And how many lots to an acre in that tract?

A. I don't know. [67]

Q. Did you check up at that time, and did you know? A. I don't remember. I might have.

Q. That was 1927, in the month of June?

(Testimony of Howard D. Kerr.)

A. I don't remember whether I checked it up, or not.

Q. In giving your appraisement, did you not take into consideration the number of lots per acre?

A. No, sir.

Q. You did not? A. No, sir.

Q. What, in your opinion now, is the value of that land on an acreage basis? A. Located as it is?

Q. Yes, the T. Wah Hing property.

A. I don't know. I don't know what the developments have been since that time. I have not looked at it since that time.

Mr. BUTLER.—That is all.

Redirect Examination.

Mr. WELSH.—Q. How do you reach the conclusion of the difference in value between the T. Wah Hing property, and lots 78 and 83?

A. One of them is close to the town site of North Sacramento, where they have little home sites and cheap lots. You can go out there and put up a cheap house and live in that until you can build a better one. Some of the people out there build garages and live in them until they get the money to build a house.

Q. It is located in a town site? A. Yes.

Mr. BUTLER.—Q. As a matter of fact, there never has been any development in that tract up to this day, has there, Mr. Kerr?

A. Yes, I believe there has. [68]

TESTIMONY OF CHARLES T. TIPPER, FOR PLAINTIFF.

CHARLES T. TIPPER, a witness for plaintiff, testified:

I am a printer by occupation, and reside in Rio Linda. I have been living in Sacramento County for about five years. I am familiar with Rio Linda Colony. I purchased land there in 1923. I purchased ten acres from the Sacramento Suburban Fruit Lands Company in 1923. I planted three hundred fig trees on that land in 1924, and a family orchard of twenty-six or twenty-eight trees. I was not able to produce fruit in commercial quantities from that land.

I know the general direction of Lots 78 and 83, belonging to Mr. Hayes. It is about three-quarters of a mile northeast of me. I am familiar with the creek that runs through there. In January and February, 1927, that creek was overflowed a couple of hundred feet from one road to the other, a half a mile apart.

I am acquainted with the character of the soil out there, only generally, that it is underlaid with hard-pan. I don't know to what extent. I know it is deep. My trees made a fair growth for a year or two, then they gradually died. Some are still living. At the present time in my fig orchard there are between seventy and eighty dead trees.

(Testimony of Charles T. Tipper.)

Cross-examination.

Mr. BUTLER.—Q. What is the age of your trees?

A. They were planted in 1924, the spring of 1924.

Q. Do you know how long it takes a fig tree to come into normal bearings?

A. I should say that—

Q. Do you know?

A. There are no full-bearing orchards in California, according to the University of California bulletin. [69]

Q. Now, let us get back to the original question. Do you know how long it takes a fig tree of the variety you planted to come into heavy bearing?

A. No, sir.

Q. This year of 1927 was an exceptionally wet winter, was it not?

A. Just for several weeks there it rained steadily.

Q. And that was the time that the creek overflowed? A. Yes.

TESTIMONY OF ADOLPH STERN, FOR PLAINTIFF.

ADOLPH STERN, a witness for plaintiff, testified:

I am a rancher at Rio Linda. I became a resident there in 1922 by purchase of land from the Sacramento Suburban Fruit Lands Company. After I purchased the land I planted five acres to Kadota Figs, and a family orchard. The last year

(Testimony of Adolph Stern.)

I produced $4.83 worth of figs. The trees that grew made a fairly good growth the first couple of years, but since then they started to die out and grow more uneven and more unhealthy every year. Mr. Schei, the manager here, told me that he would have Professor Cornat from the University of California, a specialist on fig culture, give a lecture at the Rio Linda schoolhouse, and I attended that and I learned how to plant trees, and I planted them according to his suggestion and advice.

Cross-examination.

The fig trees were planted in 1923, and the family orchard in 1924. I am now engaged in the poultry business, but I have not been so engaged ever since I have been in Rio Linda. I first went into the poultry business in 1925. That was not the first time I started. In 1923 I brooded pullets and sold them, three months old.

Q. How long does it take a fig tree of the variety you have to come into heavy bearing? [70]

A. I have been told by the agents back east that a fig orchard should bear the upkeep of the orchard in the third year. Mr. Fotheringham and Mr. Lindsay, the agents back there, told me that. They told me that the fifth or sixth year I would have an income between five and six hundred dollars a month out of it.

Q. What investigations have you made outside of the lecture you attended by the Professor from the University of California to determine how long it took figs to come into full bearing? A. None.

TESTIMONY OF CHARLES T. TIPPER, FOR PLAINTIFF (RECALLED).

CHARLES T. TIPPER, recalled, for plaintiff, testified:

I planted the fig trees I have testified about under the direction of Mr. McNaughton.

TESTIMONY OF JOSEPH V. KRAL, FOR PLAINTIFF.

JOSEPH V. KRAL, a witness for plaintiff, testified:

I am a rancher in the Rio Linda district. I came there in June, 1926. I purchased my land from the Sacramento Suburban Fruit Lands Company in Minneapolis. There they told me that the land was well adapted for raising all kinds of fruit except bananas.

I am partly acquainted with Mr. Hayes' land. It is about two or two miles and a half from mine. I cannot tell exactly.

I have not yet planted any fruit-trees on my land. I made an investigation of the soil. I found the hard-pan there down between eight and twenty-four inches.

Cross-examination.

Mr. BUTLER.—Q. You came to California and made an examination of this tract of land before you bought your piece, did you not? [71]

A. I did not, no, sir.

(Testimony of Joseph V. Kral.)

Q. Didn't you come to California before you had a contract, and didn't you go out over the Rio Linda Colony?

A. You say before I had a contract.

Q. Yes. A. I did, yes.

A. And you went out and looked at this tract of land before you made a contract, didn't you?

A. I did not look at that particular piece of land, I did not even step out of the car, we only went by that land, I did not investigate it, at all.

Q. All that you did was to go out and drive through the colony in a car: Is that right?

A. Yes, that is right.

Q. Is it not a fact that your purpose in coming to California was to buy a number of tracts of land, in order to provide homes for the different members of your family?

A. Yes, I was figuring that I would take two or three of the boys out here with me.

Q. You are in the poultry business, are you not?

A. So far, yes.

Q. When did you first go into the poultry business? A. Last fall.

Q. When did you first come here?

A. June 12, 1926.

Q. And you went into the poultry business in 1927?

A. In 1926, in the fall of 1926.

Q. All right. Now, let me get this straight, Mr. Kral. You came here in the summer of 1926, didn't you? A. Yes.

(Testimony of Joseph V. Kral.)

Q. And you went in the poultry business in the fall of 1926? A. That is right.

Q. And you have been in the poultry business ever since? A. Yes.

Q. You have not planted any fruit-trees?

A. Not yet. [72]

Q. Not even a family orchard? A. Not yet.

Q. You have a similar suit pending here against the company, have you not? A. I have, yes.

Q. You are suing them, yourself? A. Yes.

Q. And you are contributing money to the outcome of this suit, are you not? A. Yes.

Redirect Examination.

Mr. WELSH.—Q. In regard to that last question propounded to you by Mr. Butler, you are not contributing anything to me for representing Mr. Hayes, are you?

A. No, sir.

Q. What you meant was in regard to your association out there? A. Yes.

TESTIMONY OF FRANK ZDARSKY, FOR PLAINTIFF.

FRANK ZDARSKY, a witness for plaintiff, testified:

I am a chicken rancher now. I live in the Rio Linda district. I own some land there I bought from the Sacramento Suburban Fruit Lands Company. I signed my agreement on the second of March, 1927. I entered into the contract to pur-

(Testimony of Frank Zdarsky.)

chase the land in Minneapolis. It was sold to me as a fruit ranch and chicken ranch. They gave me literature and told me, "Here is the best ground for deciduous fruit to raise in commercial quantities," and then I could have a nice good commercial orchard of figs that would bring me five hundred dollars to six hundred dollars income, with some family orchard. The land was not planted by me to figs. It was already planted. I have not been able to produce fruit in commercial quantities on the land that was sold to me. I have not made a penny yet from my commercial orchard. When I came out there I saw that the trees had been neglected. They were not pruned, had [73] yellow leaves. Some of the peach trees and almond trees were dead; one apricot tree was dying. The place was in ruins.

Cross-examination.

I had some conversation with Mr. Kral about Rio Linda before I bought. He did not recommend to me to come out here and buy this property. He did not tell me to buy. I heard Mr. Kral had already bought a piece of property from the company at the time he came here. He said he had been in California. He would like to move to a mild climate on account of his wife's sickness, and he thought the company showed him the place here that was the place to come to, a fruit ranch. First, to start with chickens and then raise fruit. On account of that he bought forty acres. He did not tell me anything about the place I bought.

(Testimony of Frank Zdarsky.)

This picture here that appears in the book, marked Plaintiff's Exhibit No. 2, is a picture of the place I bought, the old Jacob Johnson place.

I am a plaintiff in a similar action against this company. I am contributing money to the general expense of all this group of cases, but not this case.

Redirect Examination.

Q. May I ask you what kind of trees are the trees that appear in that picture?

A. Those are acacia trees.

Q. Not fruit-trees? A. No.

Mr. WELSH.—We ask permission at this time to amend the caption of our complaint. It reads now "Sacramento Suburban Fruit & Lands Company." We ask permission to strike out the word "and" and to add an "s" to the word "Land," making it "Lands." [74]

Mr. BUTLER.—No objection.

The COURT.—All right.

Mr. WELSH.—The plaintiff rests.

The COURT.—Proceed for the defense.

TESTIMONY OF JOHN POSEHN, FOR DEFENDANT.

JOHN POSEHN, a witness for defendant, testified:

I live in the Rio Linda Colony. I will have lived there five years in November. I own ten acres of land. I am in the chicken business. I have about forty fruit-trees planted on a portion of my land.

(Testimony of John Posehn.)

They are a group of general varieties for a family orchard. I have not attempted to go into the commercial raising of fruit.

The depth of soil where my fruit-trees are planted is half a foot, a foot and two feet. I blasted for my trees. There is hard-pan under my ground. The trees have made a very good growth in the blasted holes. The are all in a good healthy condition. I planted my trees in 1924. I lost two trees. It was my own fault. There was water standing from rain in the winter time, and I should have drained that off. That is the reason the two trees died. That was in the heavy rain of the winter of 1926–27. I replanted those trees after that time when I took out the dead ones. The replanted trees grew good.

I have had fruit off my trees. They produce very good. I have all I need. There is some on them yet, and lots on the ground. I have plenty for my family use.

I have a vineyard of four hundred vines, in eight different varieties of grapes. The ground was not blasted where the grapes were planted. The depth of soil there is about the same as in the orchard. There is hard-pan there too. The grape-vines [75] grew very good. I planted them in 1925. I had sixty pounds of Thompson Seedless from one vine, and the next one to that was forty-five pounds, and then from the Malagas forty-one pounds from one vine. The vines have all produced well. The grapes are very sweet. I have my own sugar scale,

(Testimony of John Posehn.)

and I tested them, and there is twenty per cent sugar.

My son, Robert, has a place next to me, right near mine. He is in the poultry business. He has a family orchard. His trees have grown very good. They were blasted. I planted them myself. He has also some vines. That ground is not blasted. They grow very good. The trees and vines on my son Robert's place produce very well.

This is a picture of Robert's place. Those ornamental trees all grow well. There is one thirty feet high, and it measured thirty inches around above the ground. I planted that in 1924.

This is a picture of my place, in my vineyard.

(The pictures were offered in evidence as Defendant's Exhibit 10.)

Cross-examination.

I make a living for myself and family by my chickens. I do not depend on the raising of fruit. I have no idea of raising fruit. I have my chickens. I depend on my chickens.

I have sold some of my fruit. I sold one thousand seventy-two pounds of grapes. I use grapes myself for my family.

I dug a well pit on my land. I dug through an inch or two inches of hard-pan in digging my well pit.

I raised fifteen hundred chickens.

In 1927 I bought some fruit for family use from a man who [76] came around and asked me to

(Testimony of John Posehn.)

buy a pail of plums, and I bought a pail of plums from him. I did not buy any grapes in 1926 from Archie Phelps.

Q. How did you dig your well, with pick or shovel, or did you blast it?

A. We blasted the two inches and then you can do the rest with a pick. When you want to make headway you use dynamite.

Q. Did you use dynamite? A. Oh, yes.

Redirect Examination.

I am in Subdivision Number Six, the same that Mr. Hayes is in.

Mr. WELSH.—Did you cement your well pit?

A. No.

TESTIMONY OF HERBERT WALTER, FOR DEFENDANT.

HERBERT WALTER, a witness for defendant, testified:

I recall an instance of having loaned an auger to Mr. Frank L. Hayes, the plaintiff in this case. There was some conversation when he brought it back to me. At that time he stated to me that he was agreeably surprised that his land was from thirty inches to six feet deep along the creek.

Cross-examination.

I have testified in some of these cases for the defense as a valuation witness. I have not testified in any of the cases for the plaintiff.

(Testimony of Herbert Walter.)

I am connected with George K. Fleming, and I myself handle country lands throughout the northern part of the state. I am a member of the California Real Estate Association. [77]

TESTIMONY OF LAMBERT HAGEL, FOR DEFENDANT.

LAMBERT HAGEL, a witness for defendant, testified:

I live in Rio Linda, in Subdivision No. 6, the same subdivision with Mr. Hayes, the plaintiff. I do not know Mr. Hayes. I do not know his place. I know the Tipper place and the Stern place. I have observed the condition of the orchards on the Stern and the Tipper properties. The Stern property was well taken care of—not well, but it was fairly well taken care of, you might say, the first couple of years. From then on there was hardly any care at all. They go to work and plow it and disc it, as a rule in the spring, and that is all they do. There is not sufficient care bestowed on the Stern orchard to care for it properly.

There was no care put on the Tipper orchard either, to amount to anything. For the first two years the orchard was looking fine, but since 1927 and since these trials have been on they have kind of neglected them. I would say the present condition of both the Stern and Tipper orchards is due to lack of care.

The soil on the Stern property is exactly the same as mine, to my knowledge. The Tipper place

(Testimony of Lambert Hagel.)

is a little flatter soil, but I believe just as good as mine, or a little better, because it is near the creek.

I have forty acres. I have planted fifty-eight fruit-trees for a family orchard on my place in about thirty-six different varieties. The depth of soil where my trees are planted varies from seventeen inches to twenty-four inches. I blasted for every one of them.

Q. After you blasted those holes, can you tell me whether or not the water stands in the holes, as in a pothole, or whether there is sufficient drainage to take care of the surplus water? [78]

A. I blast my holes, for instance, in the fall and then in the following spring I found in one hole the water was not sinking down fast enough. In all the rest of the holes the water went down fast. Then I blasted the same hole again, and planted my trees.

WITNESS.—I have had no trouble at all since I planted. I planted the trees in those blasted holes in 1924. I have two nectarine trees on twelve-inch soil. The trunk is six inches thick in diameter, and about fifteen feet high. They gave me three lug boxes full of nectarines to the tree. They were big in size and good in flavor.

I have sixteen cherry trees, and they run all the way from two and a half to three and a half inches around the trunk, and from twelve to fifteen feet high, except one is not so high as the others. All the other trees are about the same as the cherry trees.

(Testimony of Lambert Hagel.)

I had three trees die in 1927 in the general sour sap condition that went through Sacramento valley. That was not local to my place. It was general throughout the valley.

The crop of fruit that I have had off my trees has been satisfactory. I had an awful heavy crop from my cherry trees, and also from my apple trees. The rest of the fruit-trees have not brought a heavy crop, but what they have is fine big fruit and good in flavor. The reason, I believe, is that they are only young trees, four years old, and I just sprayed them the first time last spring, and so they did not blossom very heavy.

Besides raising fruit and grapes, I am in the poultry business. I have fourteen hundred chickens.

I have twenty-eight acres in vines. The oldest are about three and a half years old. They were planted from cuttings. [79] I did not blast for them, and I did not water them. I never put a drop of water on them since I planted them. They have made a wonderful growth. None of them have died, but I lost seventy-five during the heavy wind the other day on account of the heavy load they were bearing. Seventy-five or a hundred broke right off. That was caused by the wind, the load was too heavy. The roots are still in the ground. Just the trunk broke off.

Last year when the grapes were about two and a half years old I sold between four and six tons of grapes off the nine acres, which was the first year's

(Testimony of Lambert Hagel.)

bearing. This year I have sold close to five tons off the same field, and I have around four and a half acres to pick yet. Considering the vines were not pruned for a crop this year, it is very good production. I only pruned them for shape.

I have had experience in fruit outside of my place there. I was working in Auburn for the summer, and I worked at Newcastle another summer, and I worked two months at Penryn in the fruit district, collecting experience.

I consider the land where I am located adapted to the commercial raising of fruit. I am well satisfied. In my opinion the land throughout Subdivision Number Six is adapted to the commercial raising of fruit.

Those pictures shown me are pictures of my vineyard. They were taken on my place.

(The pictures were offered in evidence as Defendant's Exhibit 11.)

Cross-examination.

I have testified for the defendant in all the cases tried in this court except one. I came here voluntarily to defend my own [80] property against this scathing denunciation that is going on against it at the present time. I get no pay from the defendant.

I planted the vineyard myself. I decided to plant a few trees just for my own use, and twenty-eight acres of vines for commercial purposes.

In 1927 I sold between four and six tons off my ten acres. I don't know the parties to whom I

(Testimony of Lambert Hagel.)

sold. They came to my place and asked for good grapes, and I did not ask their names or addresses. Some of them were from Sacramento. I never sold any of my tree fruit.

I am acquainted with Mr. Stern. I did not tell him in the year 1926 that it was foolish for him to plant fruit-trees on his land, or fig trees. I did not say anything of the kind. I am acquainted with Mr. Kral.

Q. I will ask you if you did not, the first Monday in December, 1927, at Mr. Kral's place, tell Mr. Kral that he should plant grapes, that it was useless for him to plant tree fruit?

A. I did say it, yes. I said, "Mr. Kral, if I was you I would plant grapes, there is a good market for grapes, but there is no market for tree fruit, because the market is overflooded, and there is no money in it." Those are the words I used.

Q. I will ask you if you did not state to Mr. Kral at the same time and place as to the price paid for the land, that the company had cheated all the fellows out there who bought land from it?

A. Nothing of the kind.

Q. I will ask you if in the latter part of November, 1927, at Mr. Kral's place, in the presence of Mr. and Mrs. Perra, Mr. and Mrs. Klein, and Mr. and Mrs. Kral, you said that the Rio Linda land was too shallow for tree raising, it was foolish to plant tree fruit [81] there and expect it to grow. Did you state that, or not?

A. Nothing of the kind.

TESTIMONY OF H. F. BREMER, FOR DEFENDANT.

H. F. BREMER, a witness for defendant, testified:

I live in the Rio Linda Colony. I first purchased a piece of property there in 1922. At that time I bought eleven and a fraction acres. I went into the poultry business on that place. I have about two thousand chickens. I planted a portion of that land to fifty fruit-trees, in general varieties, for a family orchard. Where the orchard was planted the depth of soil was approximately two and a half feet.

Q. Did you blast for your trees?

A. We planted, and the following summer we blasted at the side of the tree.

WITNESS.—I owned that place about two years, and during that time the trees made a very good growth. Then I sold it. I have since purchased another place in Rio Linda, about half a mile east of the other place. I am in the poultry business there. Now, I have about twenty-five hundred chickens, not counting the baby chicks. I would say the soil on the place I now occupy is about the same as on the former place in depth. I have not tested it all.

I did not blast for the trees I planted on the place I now occupy. I planted some trees a year ago last spring, and some this spring. They have made a very good growth.

(Testimony of H. F. Bremer.)

I have had occasion since I moved within half a mile of it to visit the place I formerly owned, and pass by it, and have [82] noticed the condition of the place and the fruit-trees and the growth they have made. They have made a very good growth. Three trees have died. I have noticed the fruit that has been produced on those trees. I would say the production was very good. I have had occasion to sample it, and to notice the flavor and the size of the fruit. It is good. In my opinion, that land that depth of soil will raise fruit-trees. In other words, it is adapted to the commercial production of fruit.

This is a picture of the place I formerly owned. (The picture was offered in evidence as Defendant's Exhibit 12.)

Cross-examination.

Q. When you went out there to this colony first you determined that it would be more profitable to you to engage in the poultry raising business than producing fruit in commercial quantities?

A. We came out there with the intention of going into the poultry business.

WITNESS.—I sell no fruit off the family orchard.

I have not testified in all the cases that have been tried in this court. I missed several. I was not here yesterday, for instance, but I have testified in nearly all the cases. I am not buying any land at the present time from the defendant.

TESTIMONY OF F. E. UNSWORTH, FOR DEFENDANT.

F. E. UNSWORTH, a witness for defendant, testified:

My place is in Rio Linda on the main highway, this side of the town site of Rio Linda. I bought that property last October, [83] five acres. A portion of it was planted to fruit, mostly Tuscan peaches.

I have tested the depth of soil, so I can tell that a portion of the ground planted to Tuscan peaches is less than five feet in depth. The trees are about eight years old. Where those trees are planted on soil less than five feet in depth, they have made a very good growth. I had a good crop off them this year. I got five lug boxes from one tree, and they would average about three lugs. There are from forty to forty-five pounds to a lug box.

I have a lot of vines there. They grow very fine. I came to California in 1889, so this is not an eastern sale.

This is a picture of my place, showing the peach trees and the flower garden.

(The picture was offered in evidence as Defendant's Exhibit 13.)

Cross-examination.

I have testified for the defendant in practically all the cases that have been tried in this court. I have missed a few, I think.

(Testimony of F. E. Unsworth.)

I am a meat-cutter by occupation.

I sold about a hundred dollars' worth of Tuscan peaches off the place. I did not sell any more than that. It was because of the market conditions. I had the fruit if I could have sold them.

I haven't sold anything else off the land, not in fruit. I am in the poultry business, that is my chief occupation.

Redirect Examination.

This is the first year that I have had a crop. [84]

TESTIMONY OF LOUIS TERKELSON, FOR DEFENDANT.

LOUIS TERKELSON, a witness for defendant, testified:

I live in Rio Linda. My place is on the highway this side of the town site, and across the street from Mr. Unsworth's place. Before coming to Rio Linda I lived in Southern California. I am engaged in fruit raising. I have been engaged in fruit raising over three years. I have lived in California about thirty-five years.

I bought my property in Rio Linda fifteen years ago, and have owned it ever since. I have forty acres. A portion of that is planted to fruit; about three and a half acres to Bartlett pears. Some of my pear trees are planted on soil less than five feet in depth, as shallow as three feet or three and a half feet. The trees planted on soil as shallow as

(Testimony of Louis Terkelson.)

that are thirteen years old. They are still alive and in good condition. I planted those trees myself. I did not blast. This year the crop from the pear trees was not so heavy. The reason for that was the conditions in the blooming season. It was rainy and the bees could not work to pollenize the blooms. There was nothing whatever in connection with the soil, character or quality of the soil, or the depth of it, that interfered with my having a crop this year. Two years ago I had a very heavy crop of pears. I sold about seven hundred boxes and there were over three hundred boxes left on the trees. This year I sold about two hundred eight boxes, and then the packing-houses closed down and I was left with over a third on my hands.

I have about twenty-three or twenty-four acres in almonds. I have had a very good production from my almonds. The trees are about thirteen or fourteen years old. They are still alive. This is a picture of my almond orchard. The reason the leaves are [85] off the trees is that when we harvest the almonds we knock them off with poles onto sheets, and the leaves come with them.

I consider the land where I am located is adapted to the commercial raising of fruit.

I know the Unsworth place. I consider that that is adapted to the commercial raising of fruit.

(The picture was offered in evidence as Defendant's Exhibit 14.)

Cross-examination.

I have not testified in practically all the cases of

(Testimony of Louis Terkelson.)

a similar nature which have been tried in this court. I don't know in how many of them I have testified. I have not kept track of them. I don't know whether it was more than ten.

I know how deep the soil is there on my land. The shallowest I have found is just about three feet. The deepest, I think, is around eight feet. I had a light crop of pears in 1928 under the weather conditions. The almonds which I speak of were not grown on soil about five feet deep. It varies from three feet to eight, I think. I could not tell how much of that land is less than five feet in soil depth. I never made any close examination.

Redirect Examination.

I have been in the fruit business for thirty years. I have never heard of any rule among practical fruit men or fruit raisers requiring five feet of soil before you can successfully grow fruit-trees. I have never heard of such a rule. There is nothing to that.

TESTIMONY OF JAMES GEDDES, FOR DEFENDANT.

JAMES GEDDES, a witness for defendant, testified: [86]

I live in Sacramento. I have lived in this community between thirty-six and thirty-seven years. In Yolo County I was engaged in fruit raising and buying for the canneries for years. For the last

(Testimony of James Geddes.)

twenty-five years I have been buying lands for corporations and can companies.

I am familiar with fruit-growing conditions through the Sacramento Valley, and with lands devoted to the raising of fruit east of the Sacramento River.

Q. Can you state whether there is any considerable area of fruit planted east of the Sacramento River where fruit is being raised successfully on hard-pan land of less than five feet of soil?

A. Practically all east of the Sacramento River; when you get half a mile or a mile back from the river you get into hard-pan lands over the entire county. The bulk of fruit that is raised is raised on hard-pan land.

Q. Of less than five feet? A. Yes.

Q. Is fruit being raised successfully and commercially on land of that character?

A. It sure is.

WITNESS.—I have been through the Rio Linda Colony. I have known that district for some years. I knew the Haggin Grant before it was subdivided, and I know this Rio Linda Subdivision. I have been over it a good deal.

I went over the two lots in question here belonging to Frank L. Hays, described as Lots 78 and 83 of Rio Linda Subdivision Number Six. I know the soil conditions out there through that territory. In my opinion, and from my experience in the fruit business, and my observations through the county

(Testimony of James Geddes.)

of Sacramento, that land is adapted to the commercial raising of certain kinds of fruit. [87]

I am familiar with real estate values in that locality. I have been buying and selling lands in this county for twenty-five years, and have bought and sold land in the Rio Linda district itself.

Q. What in your opinion was the reasonable market value of these lots during the years 1926 and 1927: If there was any variation between those two years, tell us, and if there was not, tell us that.

A. Very little variation. I think there is twenty-two acres in the lots, as I understand it, about twenty-two acres in the two lots. Taking it as a whole it would be worth about three hundred fifty dollars an acre, as a whole. If it were broken up into five-acre tracts it might be worth a little more.

Cross-examination.

I have not testified in practically all these cases. I think this is about the fifth, if I remember right. I have not testified under any contract with the defendant. I never worked for the defendant. I never worked for anybody. I have not sold any hard-pan land myself in the Rio Linda district to easterners. I have sold to westerners, or middle-westerners, friends of mine.

Q. And you represented to them that it was suitable and adaptable for the raising of deciduous fruit in commercial quantities?

A. I represented nothing. The fruit was on the place already. They could see it.

(Testimony of James Geddes.)

Q. Did you tell them that they could raise fruit in commercial quantities off that land and make a living off it? A. Who are you referring to?

Q. The people to whom you sold the land. [88]

A. They did make a living. They lived on the place.

Q. I say did you represent that to them?

A. I did not. I didn't have to.

WITNESS.—I did not sell it to them to go into the poultry business. The place was all ready for them to live in. There was a nice little house on it, and they used it for a home.

As I understand it, this corporation has about twelve thousand acres in the colony. It extends to the east of the railroad. Of the twelve thousand acres I would say, offhand, there is probably a thousand acres planted to fruit in the vicinity of Rio Linda. I am not just guessing at it. I have been over it many a time.

I don't know how many acres are planted to fruit-trees in Rio Linda Colony; I would say approximately one thousand acres, all told.

TESTIMONY OF ARTHUR MORLEY, FOR DEFENDANT.

ARTHUR MORLEY, a witness for defendant, testified:

My name is Arthur Morley. I am engaged in the fruit business, and have been for about seventeen or eighteen years, mostly in Yolo County and

(Testimony of Arthur Morley.)

Sacramento County. I live in the Arcade district, about a mile south of the south line of Rio Linda, on a part of the old Haggin Grant. I own about seventeen acres there. I have owned them for eight years. When I purchased it the trees were already planted. I have mostly plums. I have plums, pears, apricots, cherries. My orchard is a commercial orchard.

The depth of soil in the orchard runs from two to three feet, or something like that. The ground is blasted where the trees [89] are planted. The trees have made a very good growth. I think the trees are now ten or eleven years old. None of the trees have died since the first year, when I lost several. They were replanted. The replanted trees have lived and grown. At the present time the condition of the trees is very good. I had a heavy crop this year in everything except peaches. The reason for the light crop in peaches was that I pruned them very heavy last year and I think there was a frost when they were in full blossom this year, and there was a small setting of fruit. The larger portion of my crop is the Wickson plum, and other varieties. They are shipping fruit. I shipped about a thousand crates of plums from the place this year, under the Blue Anchor Brand of the California Fruit Exchange, which is the highest quality that is shipped out of California. The fruit was all shipped to eastern markets. There was a lot I sold locally, and a lot left

(Testimony of Arthur Morley.)

on the trees. I did not have a very good market for some varieties.

Regardless of the market, the crop was very good this year. I consider the land where my orchard is planted on two feet, two and a half feet and three feet of soil adapted to the commercial raising of fruit.

There are lots of other orchards in my vicinity. George Fletcher has twenty-six acres in plums, almonds and Freestone peaches. He has a good crop practically every year. He has had as much as half a ton of almonds to the acre. He has one block of plum trees, the Beauty plum, an early variety, of which he has had a thousand crates every year off those trees. The soil on that place is about the same depth as the soil on my place.

O. G. Hopkins has a commercial orchard. He has a good crop of oranges and almonds. The almonds are a little late this year. He has a good prune crop. He has about ten acres in prunes [90] and I would estimate he has had a ton of dried prunes to the acre. That is a very good production for young trees.

I am acquainted with the Harry Wanzer place, and also the Bassett place. There are about thirty acres in the Wanzer place, planted mostly to peaches, pears and apricots. This is on blasted shallow ground.

Q. What was the production this year off the Harry Wanzer place?

(Testimony of Arthur Morley.)

A. We sent to the cannery about fifty tons of peaches. That was about half the crop. Half the crop went to the ground on account of low prices. They were very particular this year, of course.

WITNESS.—That would be approximately one hundred tons of peaches off twenty-three acres. That is a very fair production.

I know the orchard belonging to Mr. Walton Holmes.

Q. What was the preparation of the ground there for the planting of trees?

A. The holes were blasted, and then about the third year they subsoiled the ground.

Q. What is the depth of the soil on the Holmes place?

A. I know that when they went through with the sub-soiler there was the hard-pan tore up.

WITNESS.—That place is planted to peaches and apricots. The production there was good crops.

I am acquainted with the June B. Harris property. There are, I should judge, about ten acres there. That is planted to Phillip Cling peaches. The trees were blasted for. The depth of soil would be about the same. The depth of soil in that locality [91] where those various orchards are planted runs practically about the same as the depth of the soil in Rio Linda.

In my opinion, the area where those orchards are planted, the land is adapted to the commercial raising of fruit. Doctor Harris had a heavy crop.

(Testimony of Arthur Morley.)

The trees are bending over and touching the ground on account of the weight of the fruit. The fruit is good in quality and size. I know the Rio Linda district. I have been over that district many times.

I was recently employed by the defendant, Sacramento Suburban Fruit Lands Company, to go over that country and make an agricultural survey of the situation, and I did so, spending about thirty days in the examination, when I became acquainted with the quality and depth of soil in the Rio Linda district. It is very similar to the soil on my tract. The quality and its productiveness are just about the same. From my examination of the Rio Linda tract, my experience in fruit raising, and particularly from my experience in raising fruit on the type of soil and soil of that depth and quality, I think the Rio Linda district is adapted to the commercial raising of fruit.

I have made a count of the number of fruit-trees growing throughout the Rio Linda Colony in this investigation.

Q. Will you give us your findings, please?

A. We found there were almonds 18,720, olives 9,370, peaches 7,060, plums 2,950, pears 8,875, prunes 6,040, figs 10,230, apricots 1,550, cherries 9,465, apples 600, persimmons 100.

Q. Making a total of what? A. 83,650.

Q. And vines? A. 97,650.

Q. Did you find, outside of that count, any trees and vines growing in what might be called family orchards? [92]

(Testimony of Arthur Morley.)

A. Yes. The first that I gave you was commercial orchards. We estimated the family orchards at 325—or homes, with an average of 25 trees. That would make 8,100. Ten vines to each orchard, making 3,250.

Q. Now, give us the total of trees in the family orchards and commercial orchards in the district, and the total number of vines?

A. Total trees, 91,750; vines 100,900.

Q. As to the general condition of those trees and vines, consistent with the amount of care that apparently had been bestowed upon them, will you tell us what their condition was?

A. Where they were taken care of they were looking good. We found a lot of trees that had been neglected, insufficient watering and care, and not pruned properly, and things like that.

Q. In those cases, what did you find to be the condition of the orchard, where the case was not apparent?

A. The trees were not doing so well.

WITNESS.—I found in general where the trees had been apparently receiving proper care, cultivation and irrigation, that they were in a good healthy condition and bearing fruit in satisfactory quality and quantity.

I am familiar with the hard-pan that runs through Rio Linda, and all through it is about the same. I know the character and depth of the hard-pan. There is usually about one inch of real hard-pan. Underneath that layer of hard-pan in some

(Testimony of Arthur Morley.)

places it is a little harder sand, and in other places more of a chalky nature. It absorbs water after you blast through the top thickness of hard-pan. I have found in my fruit-raising experience that after blasting through the top thickness of hard-pan, that the surplus water [93] will drain from the roots of the tree without doing any harm in most cases. I find that the subsoil underneath the layer of hard-pan absorbs a sufficient amount of water to turn it back into the tree. I have had experience in fruit farming on river lands. I have done pruning and cultivating and planting, etc.

Q. Now, in respect to the quality and kind of fruit-trees raised on river bottom lands, as compared to that raised on uplands, what would you say as to its shipping quality?

A. In my opinion, the uplands fruit for shipping purposes is the best. It has more sugar content. They are firmer. They have a better carrying quality than the river bottom fruits, that is, peaches and plums and apricots, and that kind of fruit.

Q. How about the shipping quality of the Bartlett pears?

A. Our pears carry very well. They go under what is called the Mountain Brand. Anything on the upland, any fruit that has the Mountain Brand, such as pears and things like that, usually demand a better price than river pears.

Q. With reference to almonds, are almonds raised at all on river bottom lands?

(Testimony of Arthur Morley.)

A. Not very much, no. They get away from the river for almonds and olives and apricots. They don't like to have them along the river.

WITNESS.—There is a considerable quantity of almonds, olives and apricots raised on the uplands. All the way from Fair Oaks up to Oroville, and all through Carmichael and Arcade. I know the conditions in the Oroville district. That is a hard-pan area and shallow soil. There is a great quantity of fruit, olives, oranges, peaches and figs, raised in the Oroville district on hard-pan lands. [94] They are very early and are usually of good quality —the olives and the oranges.

I have been in the peach-growing district of Sutter County, but I never made any special investigation. I don't know whether or not there is a great quantity of peaches raised on hard-pan land in Sutter County. I never investigated that.

I made an investigation on the Rio Linda tract to determine whether the opening of the hard-pan by blasting would provide ample opportunity for root penetration. It does. We dug alongside three olive trees a depth of about four or five feet, and we found the roots were extending into the hard-pan, or the surface underneath. We also made an excavation beside a plum tree, and found that the fibrous roots were extending through the soil underneath the hard-pan. These pictures show the excavation by the olive trees where there was hard-pan, which is hard-pan similar to that I have mentioned as being in the Rio Linda district. There

(Testimony of Arthur Morley.)

was about a foot of soil above the hard-pan where these pictures were taken. The hard-pan and subsoil had been shattered by blasting before these trees were planted. We found there the loose soil that had been caused by the blasting; that the roots had made good growth and continued to grow through the harder stuff that had not been shattered by blasting. There were crevices and places there for the big feeding roots to go. We found nothing in that subsoil or in the hard-pan detrimental to the growth of trees. When that hard-pan and the subsoil are shattered by blasting and exposed to the air, elements and moisture, it becomes slack and disintegrated, and becomes soil. In a year or so out on the ground you cannot find it. It has turned into dark soil, just like the rest, and apparently contains the elements that support plant growth. Plants, trees and [95] vegetation grow well on it there.

(The pictures were offered in evidence as Defendant's Exhibit 15.)

Cross-examination.

My place is nearly half a mile from the creek. It is not considered as bottom land, but is upland. In that district there is very little bottom land. Arcade Creek has a little, just a few feet on each side, and that is all. I made borings to determine the depth to the hard-pan, but not on Mr. Hayes' land. I was not on his place. I made no tests on that place.

(Testimony of Arthur Morley.)

When I spoke of hard-pan land in Oroville I never made any tests of that land to determine its contents. We know it is hard-pan, but we don't know what it contains, nor how much the contents of that land in Oroville contribute to the growth of trees there.

I am not a chemist. I claim I am an expert horticulturist and an orchardist.

Q. Did you testify in the Nelson case, that was tried here?

A. I have testified in a good many. I don't just remember the name.

Q. I will ask you if in that case you testified that bottom lands were no better than hard-pan lands?

A. For certain varieties of things.

Q. What were the varieties?

A. As I stated, olives and almonds and things of that kind. Shipping fruits are better on the uplands.

WITNESS.—Mr. Hayes' land is upland. I have never examined hard-pan that has been exposed for years to the elements in the creek that [96] runs through Mr. Hayes' land. I don't know much that has disintegrated, but I have had a lot of experience with hard-pan and know it does crumple up. You cannot see it after a year or two.

Q. This piece was taken out of the creek, according to the testimony of the expert. Is that the kind of hard-pan that you say crumples up from the elements?

(Testimony of Arthur Morley.)

A. Oh, yes, if it gets wet and there is a frost and one thing and another it crumples all up.

Q. How many acres in the Rio Linda tract are planted to deciduous fruit?

A. I never worked that out. I gave you the figures on the trees. Roughly speaking, about a hundred an acre, I should say.

Q. I am referring to the total acreage.

A. I don't know.

Q. And most of that land is down in what they call the bottoms, is it not?

A. No, about a third of it is down in the bottoms.

WITNESS.—Mr. Wanzer's office was not sold by him to Mr. Bean. I looked after the pruning and the picking of the crop for Mr. Wanzer.

Doctor June Harris' land is situated on the Auburn Boulevard. Part of it is on a hill. The soil out there is not of considerable depth. There is a lot of hard-pan there. I was on the place at the time they were blasting and planting trees. I am testifying about that place from observation, it is close to my home.

Q. When you speak of commercial orchards out there, do you have in [97] mind such orchards as the witnesses testify here they use for family purposes? A. Of figs, do you mean?

Q. Yes.

A. Yes. There were more figs than a man could use for his own table. In that case that would be commercial. If we thought he planted with the idea of selling some, we called it commercial.

(Testimony of Arthur Morley.)

Q. You don't mean an orchard where a man has it for the purpose only of making his living out of it, do you? A. Not particularly, no.

TESTIMONY OF F. E. TWINING, FOR DEFENDANT.

F. E. TWINING, a witness for defendant, testified:

My residence and place of business are in Fresno. I am an agricultural chemist and have been engaged in that business in California for twenty-eight years. I have a laboratory at Fresno which is the most completely equipped commercial laboratory on the Pacific Coast.

I have had occasion to make examination of thousands of acres of hard-pan lands in the Fresno district. All through the San Joaquin Valley there are commercial orchards on hard-pan land. There were lots of orchards planted where there are spots where the hard-pan comes to the surface, and thousands of acres on less than four feet of soil. I know of no rule or practice among horticulturist or agricultural chemists which demands five feet of soil as necessary to the growth of fruit-trees. It is not customary among horticulturists or people planting fruit to observe such rule.

Q. As a matter of fact, do you know whether or not fruit will grow and grow successfully and the trees live for any length of time on soil less than five feet in depth? [98]

(Testimony of F. E. Twining.)

A. I would say the great proportion of the orchards in Fresno County are on less than five feet of soil.

WITNESS.—I am familiar with the Faulkner fig orchard in the neighborhood of Fresno. There are twelve thousand acres in that orchard. It is on San Joaquin and Madera sandy loam, the same as in Sacramento County, and the hard-pan varies, both in depth and thickness, but the majority of the trees are planted on blasted land there with hard-pan near the surface. The hard-pan, as compared with the Rio Linda district, is a little more dense in that region. I mean, a little harder. It is a little thicker there than in the Rio Linda district. Blasting that thick hard-pan in that area opens it up and provides drainage for the trees.

I think Fresno is the biggest grape-growing district in the world. Those grapes are planted on land of less than four feet in depth. I know of vineyards there that are over twenty-five years of age on two and two and a half feet of soil and still going and the vines produce, more than one variety, both table and raisin grapes.

I am also familiar with the Oroville district. Most of the fruit being raised there commercially in the neighborhood of Oroville is on hard-pan land. I have seen orchards on a foot and a half of soil, and lots of it on two and a half and three feet—figs, olives, oranges, plums and peaches. They blast in the Oroville district for fruit-tree planting.

(Testimony of F. E. Twining.)

There are some very wonderful trees up there. Some of the best olives in the State are produced in the Oroville section. The quality of the oranges is the same. The oranges there mature early.

I am familiar with some of the peach-growing district in [99] Sutter County, where I saw one of the most beautiful orchards in California, on an average of three feet of soil. I don't know whether it was blasted or not. There is a considerable area devoted to the growing of peaches on the uplands in Sutter County.

I have devoted considerable time to investigating the Rio Linda district, and have made several hundred borings there. I know the depth of soil, and I have made investigations throughout the district to determine the chemical content of the soil. They have not been confined to any particular area, but have been general throughout the district.

Q. From your investigation of the depth of soil and its chemical content, is there any reason, that you know of, why in your opinion fruit will not grow in the Rio Linda district commercially and successfully, as well as in the Fresno or Oroville or Sutter County districts on the uplands?

A. No, sir.

Q. In your opinion, is the Rio Linda district adapted to the commercial raising of fruit?

A. Yes, sir.

WITNESS.—On this tract I found the total content of phosphoric acid is .22, or 88 pounds per acre-foot. .18 is acid soluble. Potash, total .9, or

(Testimony of F. E. Twining.)

3,600 pounds per acre-foot acid soluble, .68. The quantity of phosphoric acid and potash that will be used by a crop of fruit in a year on an acre of ground varies; in phosphoric acid 25 to 50 pounds; potash, 50 to a hundred.

I have made some examination and taken samples of hard-pan on the Hayes tract. I have the samples with me. These particular samples were taken in a ditch on the north side of the tract. In [100] that ditch I observed hard-pan such as is shown me as Plaintiff's Exhibit 7. That is some of the red material. It is just dry and hard. It will soften up and disintegrate readily when wet. That is not so hard as some of the stuff that I have. It is very similar to the surface soil. I have an analysis of the hard-pan on this tract. So far as phosphoric acid and potash are concerned, the phosphoric acid was .21, the potash .25, lime .47. Those quantities are very similar in comparison with the elements in the top soil. There is very little difference between the hard-pan and the soil.

This material I have given to you here is the surface, the hardest material. It is disintegrating now from exposure. If exposed to air and moisture it will readily disintegrate, and form soil capable of supporting plant life. There is nothing in it injurious or detrimental to plant life. It runs a little more in lime content, which is beneficial. This hard material here, if broken by blasting, will permit the absorption of water and provide drain-

(Testimony of F. E. Twining.)

age for trees if planted there. It will retain moisture so that plant life will be nourished.

The cost of blasting will vary. Ordinarily, where you blast two and two and a half feet, I would approximate it at twenty dollars or thirty dollars an acre.

Cross-examination.

This Faulkner fig orchard is not a colonization scheme. It is a subdivision that was sold practically all to Fresno people. No outsiders were brought in to amount to anything that I know of. I would not give you the average depth of soil. I know the greater portion of that soil is less than three feet.

I haven't any figures on what that land produces per acre. [101] I know that there were three packing-houses in the district, handling the crop. The advantage of deeper soil for fruit raising is that you don't have to blast it. It is necessary to have sufficient soil to hold moisture for the growing period.

Q. Is not that really the prime requisite for good fruit raising?

A. I know hard-pan lands that are better than adjacent sandy lands.

Q. You speak of cultivating this hard-pan for fruit raising purposes. Do you mean that all that would be necessary would be to blast it and stick a tree in the hole that was blasted out and cover it up and let it grow?

(Testimony of F. E. Twining.)

A. You have to cultivate any soil throughout a season.

Q. Would you have to fertilize it?

A. No, you don't have to fertilize it.

Q. You don't have to fertilize it or do any subsoiling?

A. Not any more than any other soil. So far as the plant food in that soil is concerned, that is, so far as phosphoric acid and potash are concerned, it is very good.

Q. Do you know how many years this Rio Linda Colony has been on the market?

A. No, I do not.

Q. You don't know how many acres of it is devoted to fruit raising, do you?

A. I have been over it, and I know there are some orchards on it, but there is lots of it—

Q. Just a moment. When you speak of orchards, you mean family orchards, do you?

A. In a family orchard, if the trees would grow well, they would in a commercial orchard, too.

Q. But you don't find many commercial orchards out there, do you?

A. They have never been planted. [102]

TESTIMONY OF W. R. GIBSON, FOR DEFENDANT.

W. R. GIBSON, a witness for defendant, testified:

I reside in Omaha, Nebraska. I am connected with the Payne Investment Company of Omaha.

(Testimony of W. R. Gibson.)

I had some dealings with Mr. Frank L. Hayes at the time he was negotiating for or inquiring about the purchase of land at Rio Linda.

Q. How did you first make contact with Mr. Hayes?

A. We got a list of all railroad employees in Omaha, and we had a small postal card printed about the size of a common postal card and sent them out to all railroad employees.

Q. What was on that postal card?

A. I cannot tell you the exact words, but as far as I remember it was that if they were interested in the poultry business in California to either sign the card and mail it back, or to telephone us and we would call on them.

Q. It was a question of being interested in the poultry business, was it? A. Yes.

WITNESS.—The Payne Investment Company was acting as agent for the Sacramento Suburban Fruit Lands Company in the sale of Rio Linda lands at that time. Mr. Hayes came in to see me regarding Rio Linda. When he came in I presented him with some literature.

Q. Let me ask you whether or not Mr. Hayes ever received a booklet similar to this which I now show you, which has been marked as Plaintiff's Exhibit 1, being the Fourth Edition of Poultry Farms and Orchard Homes? A. Not in our office. [103]

WITNESS.—We never had any of those books for distribution in our office, and none of our sales-

(Testimony of W. R. Gibson.)

men ever had them from our office. I gave him a green booklet. That is the only one we ever had.

I handled the transaction with Mr. Hayes. At that time Mr. Newlands was not in the employment of the Payne Investment Company, and he had not been for thirty days. The subject of the conversation between myself and Mr. Hayes was that he desired to purchase this land to go into the poultry business. During those negotiations he never even suggested that his purpose was to go into the commercial raising of fruit. There was no contract between Mr. Hayes and the Company until his return after he made a trip to California and looked over this land. I know that the purpose of his coming here was to look over the land. I had a conversation with him about the land after he returned. There was nothing in that conversation regarding the commercial raising of fruit on this tract.

After the contract was entered into on the 29th of June, Mr. Hayes had some negotiations with me regarding the purchase of more property, some time before the first of March—Mr. Hayes had another piece of property in Omaha he had been trying to dispose of ever since he made his first purchase out here, but without results, and came into the office and wanted to know if we would take in this other piece of property on more land. At that time I told him that I thought he had all the land here that he had any use for. We tried to discourage him from taking any more land, and had not solicited him or made any representations to him about

(Testimony of W. R. Gibson.)

this second tract of land, described as Lot 83 of Subdivision No. 6. We never made any representations to him to induce him to purchase [104] that tract of land by telling him it was adapted to the commercial raising of fruit. I did not tell him that the soil was all rich and fertile and that it was good fruit land.

As to any further negotiations with Mr. Hayes, he wanted to take another two and a half acre piece. That deal was not consummated. That was when he expected to come here anyway, and he came and the people here would not sell him any more land.

Q. Did you, or, to your knowledge, did any member of the firm back there ever discuss the question of the commercial raising of fruit in respect to the sale of either one of those tracts as an inducement for him to buy them? A. No, sir.

Q. Was the existence of hard-pan under this ever explained to Mr. Hayes prior to the time he made his purchase? A. Yes.

Q. When and where was it explained?

A. It was talked over in the office about there being some hard-pan under this land, and then we had three different meetings where we invited anybody that was interested in the Rio Linda poultry business to attend these meetings—and Mr. Wagamaut, the vice-president of the company, got up and made a talk and explained it, and Mr. Hayes was there.

Q. And were you there? A. Yes.

Q. And Mr. Hayes was there? A. Yes.

(Testimony of W. R. Gibson.)

Q. What was the talk made about hard-pan, what did he say about it?

A. He said that the trees would have to be blasted for, and told the depth of the hard-pan, that it ran in various and different depths.

Q. And made a full explanation of the hard-pan situation here? A. Yes.

Q. Was the raising of poultry discussed at that meeting? A. Yes. [105]

Cross-examination.

Mr. WELSH.—Q. Give me the day, the month and the year when this meeting was held, at which the hard-pan was explained to prospective purchasers, and at which meeting you say Mr. Hayes was present.

A. I don't know that I can do that. We had three different meetings, and I knew that Mr. Hayes was at two of them.

Q. Give me the dates of the two of them.

A. I cannot give you any date.

Q. Give me the month.

A. I don't think I can give you the month.

Q. Give me the year.

A. We had two meetings in 1926, and one meeting in 1927.

Q. Were the two meetings you held in 1926 meetings at which Mr. Hayes was present?

A. I think he was at one of them in 1926.

WITNESS.—This was in the spring of 1926. We held two meetings in the spring of 1926. I

(Testimony of W. R. Gibson.)

would not say that Mr. Hayes was present at both. I know he was present at the last one. I think he was present at a meeting that was held in the fall of 1927. I am positive he was at a meeting in 1926, I don't know which one.

Q. And in 1927, it was in the fall of that year, was it, that the meeting was held?

A. No, in 1927 it was in the spring of the year.

Q. When was it in 1926? A. In the fall.

Q. You had a man employed by that firm by the name of Mr. Newlands? A. Yes.

Q. Did you see him in conversation with Mr. Hayes at any time [106] during these negotiations?

A. The first time he came into the office.

Q. On the first occasion Mr. Newlands talked to him? A. Yes.

Q. At that time did you have this book, or a similar book as this is?

A. We never had any of those books.

Q. Neither one of the books?

A. Yes, we had the green book.

Q. Did you have a green book? A. Yes.

Q. Did you have this book? A. Yes.

The COURT.—Is that book in evidence, or isn't it?

Mr. BUTLER.—It is already in evidence, your Honor.

WITNESS.—I did not tell Mr. Hayes it was necessary for him to have twenty acres of land to raise poultry. I don't think we discussed poultry

(Testimony of W. R. Gibson.)

in connection with hard-pan land. I discussed hard-pan with him because it was in the book in connection with raising a family orchard. I discussed with him the raising of fruit on the land for a family orchard. That is the way I put it. I did not think he needed twenty acres for a family orchard. I did not tell him he needed twenty acres for a family orchard.

I did not say anything to him at all about the various kinds of fruit that could be planted. I did not tell him any kind of fruit. I told him I was there inspecting the land and I had seen various kinds of fruit raised. I did not say anything about quantity that could be raised off the land. I did not tell him it could be raised in commercial quantities. I did not tell him what the production was from any orchard, because I did not know.

I am still connected with the Payne Investment Company. [107] Mr. Newlands is retired. He is living in Omaha. At least, he was the last time I heard of him. The Payne Investment Company is still handling land for the Sacramento Suburban Fruit Lands Company.

Redirect Examination.

Mr. BUTLER.—Q. Mr. Gibson, did Mr. Hayes give you any reason for his wanting to purchase the second ten acres of land?

A. Yes.

Q. What was it?

A. He had this piece of property in Omaha, that

(Testimony of W. R. Gibson.)

he had been trying to dispose of ever since he made his first deal, and without any result, and he came into the office and wanted to know if we would consider taking it in on another ten acres of land, that he would much sooner have more land than he needed in California in preference to an extra piece of property in Omaha he did not need, simply because he was coming here regardless of whether he sold the house, or not.

Recross-examination.

Mr. WELSH.—Q. Didn't you negotiate the purchase of the second piece of property for Mr. Hayes out in Omaha?

A. Yes.

Q. Did you tell him to mortgage his home, and then with that money buy the other piece of property in Omaha, and then negotiate that to buy this land out here? A. No, sir.

TESTIMONY OF OSCAR H. BRAUGHLER, FOR DEFENDANT.

OSCAR H. BRAUGHLER, a witness for defendant, testified:

I have lived in Sacramento for thirty years. I was with Mr. Frank L. Hayes as the representative of the Sacramento Suburban Fruit Lands Company at the time he came here in 1926 when he first arrived from Omaha. I took him out over the colony. [108] In the course of our trip there was some discussion regarding hard-pan.

(Testimony of Oscar H. Braughler.)

After passing over the American River and explaining the conditions and the developments that had existed since the Rancho Del Paso had been cut up fifteen or seventeen years ago, in passing through the Sacramento business district, as we passed on through I explained to him that the vegetation and the trees that were growing on that land had all been planted since the acreage was subdivided; that that district was underlain with hard-pan, and the land I was going to show him, every foot of it was underlain with hard-pan. About the hard-pan, he said he came here with the idea of buying a poultry ranch, and I told him that as far as the poultry was concerned the hard-pan would not interfere in any way with the raising of poultry. When we went out on the Rio Linda Colony I called his attention to the hard-pan in the ditch, the little creek on the north, and explained to him that that ditch took care of flood water in winter and early spring, and that at times when we had an excessive amount of rain, the water came out of the banks and flooded the land, sometimes a hundred feet from the bank. I told him that that water would come out and possibly remain for four or five hours, or half a day or longer, during flood conditions. He did not offer any criticism or objection to it on that account. There was very little discussion between myself and Mr. Hayes with respect to the raising of fruit. I explained to him that if he was interested in growing, if he wanted to grow peaches commercially, he should go up to

(Testimony of Oscar H. Braughler.)

Yuba County, or to Sutter County; that the peaches there grew better and reached maturity earlier; that peach buyers went there seeking their product; that if he wanted to grow walnuts commercially there wasn't any better place in the State than [109] Ventura County, and around that section of the country; I told him about oranges, that they did very well in the Fair Oaks district, but that they did better in the Porterville country. I told him if he was interested in poultry production it was my opinion he would not find any place where he would do as well with poultry as in the Rio Linda district. He did not tell me at any time during that trip that his purpose in purchasing land in Rio Linda was for the purpose of engaging in the commercial fruit industry, or any other than the poultry business. He said he intended to go into the poultry business; that is the only thing I showed him, poultry-houses, and I brought him to people engaged in the poultry business. I took him to five or ten places where people were engaged in that business. I did not take him to any place in the Rio Linda district where people were engaged in the commercial production of fruit.

I took him over to Fair Oaks. The purpose of that trip was that Mr. Hayes was here for a few days to be entertained, and I wanted to show him adjacent to our district, and when I was up there I could show him just how that hard-pan condition existed and how trees grew in it. In the roadways that are cut through the Fair Oaks district the

(Testimony of Oscar H. Braughler.)

banks are sometimes cut down for ten or twelve feet, or in some places fifteen feet, to different layers or strata of soil, which clearly indicated the nature of it. I pointed those out to him as we made our visit over there. When we made that trip to Fair Oaks and Orangevale he at no time indicated that he was interested in the commercial raising of fruit at Rio Linda.

Cross-examination.

All that I discussed with Mr. Hayes was poultry. I did not [110] take him to Fair Oaks to show him any poultry-houses. I took him up there as a part of the entertainment I wanted to give him while he was here, and to give him a little idea of California. I took him there to show him the fruit-trees in Fair Oaks. I did not go into detail as to how successful fruit raisers were there. I told him what kind of trees they were.

The general discussion was about poultry all the time he was here. It was not entirely about poultry all through Fair Oaks. There was very little talk about fruit raising. I took him all through Fair Oaks. I don't think I took him to Orangevale.

When I had him on Lot 78 or 83 I had very little discussion with him about raising fruit. I discouraged the raising of fruit because he was interested in the poultry business. I explained the fruit proposition to him in this way, that if he was interested in raising peaches commercially he should go to a peach district; that if he was interested in

(Testimony of Oscar H. Braughler.)

raising prunes commercially he should go to a prune-raising district, Napa County or Santa Clara County. I told him that the prunes there reached a better size and carried a better shipping content and were sweeter in Santa Clara County than the larger prunes that grew in a cooler climate.

Q. What brought up that discussion?

A. It was just a general discussion.

Q. What did he say to you about raising fruit on this land?

A. It was nothing more than when we passed a family orchard, or something of that kind. I did not recommend anything further than a family orchard to him.

Q. I am speaking of the conversation you had with him when you were on this land. I understood you to testify you discouraged him [111] from atempting to raise fruit on that land for commercial purposes. Is that right?

A. Yes, because he came here to go into the poultry business.

Q. You felt at that time that the land was not adapted to raising fruit in commercial quantities, did you? A. Absolutely not.

Q. It was not adaptable, do you mean?

A. It is adapted to raising fruit in commercial quantities.

Q. It is? A. Yes, but you have to use care.

Q. But at the same time you discouraged him from going into the fruit-raising business on that land? A. Yes, I would have discouraged it.

(Testimony of Oscar H. Braughler.)

Redirect Examination.

I discouraged him from going into the fruit business at that time, because the district has been laid out for a poultry district. Fruit buyers do not go to Rio Linda to buy fruit, to any great extent. One of the best cherry orchards around Sacramento is in Rio Linda. It has produced as much as a thousand dollars net to the grower per year per acre. The market conditions of fruit during the years 1926 and 1927 have been very discouraging. That was one reason why I did not recommend his going into fruit.

Recross-examination.

I did not tell Mr. Hayes that the tract of land he bought from my company would be adapted to the successful raising of cherries.

TESTIMONY OF FRANK L. HAYES, IN HIS OWN BEHALF (RECALLED IN REBUTTAL).

FRANK L. HAYES, plaintiff, in rebuttal, testified:

Mr. WELSH.—Q. Were you at any meeting as described by Mr. Gibson?

A. No, sir. [112]

Q. Where were you at the time, in the fall of 1926 and the spring of 1927?

A. I was in Omaha. In 1927 when we closed the second deal I went to Minneapolis. I was in Minneapolis when they had their meeting.

(Testimony of Frank L. Hayes.)

Q. In 1926 did you attend any meeting?

A. No, sir.

Cross-examination.

Mr. BUTLER.—Q. How do you know that they had a meeting?

A. Because they told me they were going to have one, and I went to Minneapolis to see my cousin after I had closed the second deal, and I did not get back in time to attend the meeting.

Q. How long were you in Minneapolis?

A. I was there about five days, I believe.

Q. You were not in Minneapolis at the time of the first two meetings in 1926, were you?

A. I was in Omaha, and I was working, I was railroading.

Q. How did you know they had any meetings in 1926?

A. I don't know that they had any, only just as they said they were going to have some.

Q. They told you they were going to have some?

A. They told me they were going to have some, but I did not attend any.

TESTIMONY OF IDA E. PERRA, FOR PLAINTIFF (IN REBUTTAL).

IDA E. PERRA, a witness for plaintiff, in rebuttal, testified:

I am acquainted with Mr. Lambert Hagel. I have known him for a couple of years. I was acquainted with him in the latter part of November, 1927. I

(Testimony of Ida E. Perra.)

was present at the home of Mr. and Mrs. Kral in the Rio Linda district, with my husband, Mr. and Mrs. Kral, being present, and also Mr. and Mrs. Hagel and Mr. and Mrs. Klein. [113] At that time and place Mr. Lambert Hagel said to those present, including myself, "The land in the Rio Linda district is too shallow for the raising of fruit, and it is foolish to plant fruit-trees there and expect them to grow."

Cross-examination.

My husband and I are plaintiffs in a similar piece of litigation pending against this company, and we are also contributing toward the maintenance of all this litigation.

The conversation I speak of was in the latter part of November, 1927. My memory is clear as to the exact language used. He said it was very plain that this was not fruit land, and he thought it would be foolish to plant trees outside of a family orchard on shallow soil like this.

Q. Is it not a fact that he said that grapes produced a better income and one would be foolish to plant fruit-trees because the fruit market was so low?

A. No, he did not say anything about the market.

Q. And your memory is perfectly good for that length of time on that conversation, is it?

A. Yes, about the trees. He didn't say anything about the grapes.

Mr. WELSH.—That is our case, your Honor.

Mr. BUTLER.—I would like to make a motion for an instructed verdict upon the following grounds:

(1) That the evidence is insufficient to show that defendant deceived and *defraud* plaintiff in the making of the contract referred to in plaintiff's complaint for the purchase by plaintiff from defendant of the tracts of land referred to, or either of said tracts. [114]

(2) That the evidence is insufficient to show that the defendant misrepresented the quality or the character of the land purchased by plaintiff from defendant, or the value thereof.

(3) That the evidence is insufficient to show that plaintiff has been damaged by any act on the part of the defendant.

(4) And, further, upon the ground of the previous inspection by the plaintiff and the opportunity to discover the conditions.

The COURT.—The case is based on alleged false representations that the land was well adapted to commercial orcharding. Of course, the testimony will have to show that. Our own common sense indicates that it is not an easy matter for a man to go out and look at the ground and see these things. It might require experts to tell it. We have had experts here, and even the experts differ about it. The Court is of the opinion that the evidence is sufficient, if the jury accept it and render a verdict for plaintiff, to sustain it. Therefore, the motion will be denied.

Mr. BUTLER.—Exception.

Before the Court's charge to the jury, defendant requested the following instructions, among others:

"DEFENDANT'S INSTRUCTION No. 1.

You are instructed that plaintiff cannot recover in this action unless he was deceived by the alleged representations, for if the means of knowledge are at hand, equally available to all parties, and the subject of purchase is alike open to their inspection, if the [115] purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived, unless he was induced by trick or misrepresentation of defendant not to make such inspection."

"DEFENDANT'S INSTRUCTION No. 2.

You are instructed that a representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its terms, or is merely a loose, conjectural or exaggerated statement, cannot be made the basis of an action for deceit, though it may not be true, for a party is not justified in placing reliance upon such statement or representation."

"DEFENDANT'S INSTRUCTION No. 3.

You are instructed that this is what is commonly known as an action of deceit. The gist of the action is fraud. Fraud necessary to support the action exists where a person makes a false representation of a material fact, susceptible of knowledge, knowing it to be false, with the intention to deceive the

person to whom it is made, and the latter, relying upon it, acting with reasonable prudence, is deceived and induced to do or refrain from doing something to his pecuniary loss or damage. In order to support an action of this kind, it is necessary for the plaintiff to satisfy the jury by a preponderance of the evidence, (1) that the defendant made a substantial, material representation [116] respecting the transaction; (2) that it was false; (3) that when it made it it knew it was false; (4) that it made it with the intention of inducing the plaintiff to act upon it, (5) that the plaintiff was misled thereby, and, in reliance thereon, did act upon it, and he thereupon suffered damage. If you should find that the plaintiff has failed to prove any one or all of these essential elements, your verdict should be for the defendant."

"DEFENDANT'S INSTRUCTION No. 5.

The essence of a cause of action for deceit consists in the fact that the false representations were made with intent to deceive, such intent being a necessary element to constitute actual fraud.

It must appear from a preponderance of the evidence that the false representations, if any, were made by defendant with a fraudulent intent, and for the purpose of inducing the plaintiff to act upon them."

"DEFENDANT'S INSTRUCTION No. 9.

You are instructed that the representation of defendant, mentioned in the evidence, must have been

with regard to a material matter to constitute the basis of an action for deceit, and that to be material they must have been with respect to ascertainable facts, as distinguished from mere matters of opinion or speculation." [117]

"DEFENDANT'S INSTRUCTION No. 10.

I instruct you that general assertions or expressions of a seller in commendation of his land and bragging upon it, commonly called 'dealer's talk,' do not constitute any ground for an action of deceit or fraud; such statements are generally regarded in the law as mere expressions of opinion, upon which a purchaser cannot safely rely."

"DEFENDANT'S INSTRUCTION No. 11.

I instruct you that the expression of an opinion is not a representation and does not amount to a fraud, although false. So if the purchasers had an opportunity to examine the property and ascertain its value, the defendant's representation as to the value of the property, if any it made, is but the expression of an opinion and not actionable, even though false and fraudulent."

"DEFENDANT'S INSTRUCTION No. 14.

In order for the plaintiff to recover in this action he must prove that he has suffered actual damage by reason of the alleged fraud. Unless he proves this, he cannot recover. Therefore, if you find from the evidence that the value of the property which the plaintiff purchased is equal to or greater than

the value of the property and money which he gave or agreed to give for it, your verdict must be for the defendant." [118]

CHARGE TO THE JURY.

The COURT.—Gentlemen of the Jury: You have heard the evidence and the arguments, and now it is for the Court to deliver to you the instructions; that is mainly to make you acquainted with the law which applies to the case, and in the light of which you will determine the facts. Remember, you take the law from the Court, and having thus taken the law from the Court you proceed to determine the facts in the case, and we take that from you as disclosed by your verdict.

This is what is termed a civil action. The plaintiff makes certain allegations as a ground of action against the defendant, which the defendant denies, save and excepting that the bargain was made between the parties. It devolves upon the plaintiff, before he can recover in this action, to make it appear to you by the greater weight of the evidence that his allegations in substance are proven by the greater weight of the evidence before he would be entitled to a verdict at your hands. The allegations in the complaint are various false representations which the plaintiff alleges were made by the defendant. The plaintiff is not required to prove them literally, word for word; nor all of them. If he proves enough to sustain his case in substance by the greater weight of the evidence, that is sufficient to entitle him to a verdict at your hands.

The defendant is not obliged to prove that any representations it did make were true, or it is not obliged to prove it did not make the representations; all that is necessary for it to do is to offset, if it can, any case that has been made by the plaintiff.

The issue simply is, are the false representations made, were they false, did they contribute to induce the plaintiff to purchase the land, and has he been damaged? [119]

When you ask yourselves whether the greater weight of the evidence is with the plaintiff you do not look to his evidence, alone, you take all of the evidence into consideration, that for the defendant, as well as that for the plaintiff, and ask yourselves whether, viewing it as a whole, considering it as a whole, the greater weight is with the plaintiff. If it is, he is entitled to a verdict. If the evidence is in equal balance, or if the greater weight is with the defendant, then, of course, the plaintiff is not entitled to recover. No matter how good a case a plaintiff may have when he comes into court, he must prove it with the requisite amount of evidence before he can expect to get out of court with a verdict at your hands. When you come to ask yourselves whether the greater weight of the evidence proves the plaintiff's case, you are of necessity compelled to pass on the credibility of the witnesses, to some extent, because there is considerable conflict between the witnesses in this case. That is peculiarly the function of the jury, to determine which witness speaks the truth, what weight you

will give to his testimony, what inferences you will draw from the circumstances that are disclosed as surrounding the case.

In determining the credibility of the witnesses, you take note of the demeanor of the witness on the stand, whether he is fair, frank, open, or whether he is evasive or forgetful, whether he seems to have the requisite knowledge in respect to the matter he is testifying about, whether you believe he is honest enough to report accurately the result of his investigation, his observation, and his knowledge. You take into consideration the interest of a witness where any appears. There is some, of course, on both sides of this case. The plaintiff, himself, is largely interested; and the defendant corporation is interested, and it appears by one or two at least of its agents who have testified here in its behalf. [120] Ask yourselves whether such interest, if there is any, in the case, has influenced any witness to depart from the truth in the hope that he can make the worst appear to be the better reason to you, in the hope that he can deceive you and one side or the other secure a verdict to which it is not entitled.

A witness may contradict his own statements. It is for you to determine where the truth is. It may appear in some instances that at some other time or place the witness has made contradictory statements. If that is true in this case, you, of course, will consider that.

There is a maxim that a witness may be presumed to speak the truth. But you may see instant reason why you will not give him the benefit of that pre-

sumption; you may see it in his demeanor, or otherwise, and you may refuse to accord it to him. You may see it in the unreasonableness of his statements, or in contradictions made in his own testimony, or that he has been contradicted by others. When two witnesses flatly contradict each other, and there is considerable of that in this case, there is no presumption that either speaks the truth, and upon other considerations you determine which speaks the truth, and how far.

If a witness testifies falsely in any particular, and you believe that he has, you distrust all the balance of his testimony, and if your judgment approves, you can reject it all, because if his oath has not held him faithful to the truth in one instance how can you be assured that it has in other instances.

You are not obliged to believe anything is so simply because a witness swears it is so. If a witness wants to, he can swear that black is white. You would not be disposed to believe that. You must test out what he swears to by the credibility [121] of it, by the reasonableness of it, whether probable or improbable, and whether, taking into account all that makes for credibility, you are inclined to believe he has testified truthfully.

When experts testify, as here, you must remember that the same rule applies to them. You are not obliged to believe a thing is so simply because some expert swears it is so. Four experts in this case flatly contradict one another, some in respect to facts, and some in respect to opinions. An expert is one who is supposed to have special knowl-

edge upon some subject more or less abstruse and not open to the average man without some industry in penetrating its mysteries, more industry than he is inclined to give to it. In so far as you believe an expert has the ability to know and honestly to tell you correctly, you will give credit to him, and no further. When they contradict each other you will determine which of them speaks the truth, the same as with any other witness whom you prefer to believe, or whether you do not believe, either, then, on your own common sense, you determine what is likely to be the truth with respect to the issue in which they contradict each other.

You may prefer to believe circumstances to any witness. A witness may swear to anything. I do not say they have in this case. I am putting that to you as an illustration. Certain circumstances may point unerringly to the truth. You might determine that for yourselves by a myriad of illustrations. So the law says a jury may prefer to believe the general surrounding circumstances rather than the statement of a witness in regard to the same matter.

In this case, one witness is enough to prove any fact involved in the issue, provided you believe he is entitled to credit [122] and give him credit accordingly. In other words, the number of witnesses is not vital. You may prefer to believe one witness on one side to several on the other side. It is a matter for your judgment. Ordinarily, if you find the witnesses have equal opportunity of

knowing, an equal recollection, an equal honesty in reporting it to you, you might prefer to believe that the testimony of several witnesses might be of more value and entitled to greater weight than the testimony of one witness to the contrary.

So much for the rules by which you arrive at the credibility of witnesses. I might close in respect to that, Gentlemen, by saying this: You determine the credibility of witnesses here just as you determine the credibility of men with whom you deal in daily life. Most of you, I suppose, are business men. I have not any doubt you take some pride in your sufficient knowledge of human nature that when you are bargaining with anyone in your business you are able to determine so much in respect to the statements of the opposite party that he cannot, as the common saying is, "put anything over on you." Just the same way you determine the truthfulness and the honesty of the men with whom you deal in daily life, you determine the truthfulness and honesty of witnesses on the witness-stand.

A great many instructions have been presented to the Court with the request that they be submitted to you. They are abstract propositions of law, most of them fairly accurate, and in so far as, without amendment, they can be given to you, the Court will give them, in substance, in direct application to the facts of the case. I think you will understand them better, and remember them better that way than if I read to you in singsong a lot of abstract rules and then later on referred to the facts in the case.

This is an action founded, as the plaintiff says, upon [123] false representations made to him to induce him to buy the land he bought from the defendant. They all agree on that. He made his bargain down in Omaha, Nebraska, one in 1926, and one in 1927. He bought a little more than 20 acres, at $400 an acre,—land lying some ten, eleven, or twelve miles from your city, according to the witness Kerr. He says he was induced to buy that land, in substance, by the false representation that it was well adapted to the growing of deciduous fruits commercially. That is about the gist of plaintiff's alleged representations. Both parties seem to have accepted that and tried the case on that theory, both in their opening statements, in their evidence, and in their final arguments to you. So we will put it that way. First, is that representation proven by the greater weight of the evidence? First of all, was the representation made? You must remember that in cases where false representations are charged—legal fraud it is termed—that fraud is never presumed. All business transactions, in the beginning, are presumed to be fair and regular; before you conclude to the contrary, there ought to be sufficient evidence to persuade you and prove to you that fraud has been committed and deception has been practiced, and that someone has been damaged. The burden is on the plaintiff to prove the fraud. Fraud is not presumed. Yet fraud may be inferred from circumstances, deception may be inferred from circumstances.

Coming now to what is necessary to appear in this case before the plaintiff is entitled to a verdict: First, he must prove to you that the representation was made to him by the defendant through its agent. Of course, the defendant corporation can speak only by agents; it has no body or soul of its own, no mouth to speak; all corporations speak through their agents. Its agent is not only the man who spoke for it, but it is the advertisements, [124] the literature it puts out, for, indeed, that literature is prepared by some of its agents. That is the way a corporation speaks. The complaint says that the representation was made to the plaintiff, both by these written books and by the agents of the defendant with whom he dealt. He testified he first fell in with Newlands, down in Omaha, and that Newlands said he had seen all this land, and that it was very rich and fertile, and highly productive land, he knew the soil, and the products, and he would show him the literature if he would come to the office. He went to the office. He met Newlands and Gibson there, and they both told him that this land in Rio Linda was well adapted to the successful growth of deciduous fruits commercially. The plaintiff also said he read these books, and that therein he finds those statements. They are in the yellow book, Gentlemen of the Jury, there is no question about that, at all; there is no reasonable interpretation of this book other than that it represents that the lands in Rio Linda are well adapted to successful orcharding commercially. And, as a matter of fact, the defendant's counsel, in the final

argument, says they stand on the book. Well, they must stand on it, Gentlemen, because it is their book, and the green book also, and that they maintain the truth of those representations. So if the plaintiff saw this book, and he says he did, he says they gave it to him in Omaha; Gibson appears on behalf of defendant and says that he has never had that book. I did not understand that plaintiff said he got it from Gibson. Maybe Newlands gave it to him. If he had that book and read it before he made the first contract, it is wholly immaterial who it came from, because the defendant gave it out as advertising to impress the person into whomsoever's hands it might fall. The representation was there, and he has a right [125] to count upon it. He says, further, that one of the agents said the same thing; in fact, he mentioned several of them as having said it. He says that Schei made that statement, Braughlar made it, Newlands and Gibson, and McNaughton. Gibson and Braughlar have taken the stand and said they did not; the others have not been brought to deny what the plaintiff has said in that regard. You may ask yourselves the question, Why should not the agents have made the representation when the company was issuing its pamphlet to the same effect? If you are merchants and you send out your advertising to bring in customers, do you hesitate to repeat orally to your customer what you represent in your advertising? That is one way by which you might arrive at the determination whether the plaintiff is truthful in that respect, or the two witnesses for

the defendant, who alone deny it, Gibson and Braughlar. But, as I said to you, it is in the book, and that is enough for the plaintiff's case, if he read it before he entered into these bargains, and he says that he did, and it is for you to say whether or not he did.

So, taking the representation as made, you proceed to the next step; that is, if you find that the representations were made either by the agents, or by the book, by the greater weight of the evidence, the next step is, was that representation false? There is the big issue in the case, Gentlemen of the Jury. The plaintiff must prove that, he must make it appear to you, from a consideration of all the evidence in the case, that the greater weight of it is that the representation was false when made to him that the land was well adapted to commercial orcharding. That is what it amounts to. To maintain that upon his part he presents to you several witnesses who have planted trees on on their land out in Rio Linda—they all agree that this section of the country is [126] all pretty much alike so far as the soil and its adaptability to production is concerned, and they testify to you that they planted their trees, and that for two or three years they flourished, and then they seemed to pine away and die. The plaintiff then presents the witness Davis, who testifies that he is an agricultural chemist, and has the learning to be called an expert, and he has testified to his learning and ability, and it will be for you to determine if he has it. He testified that he examined the land, and that the soil

has an average of only some twenty-eight inches, if I remember right, that it ranges from three inches to forty-two inches in depth down to hard-pan, and that that soil, as it stands, is not sufficient to support trees for the length of time and in the condition necessary to successful commercial orcharding. He tells you the reasons as he sees them. First, there must be five feet of soil, he says, necessary to supply the food elements to the tree, and to the fruit, to afford anchorage to the roots, to afford a reservoir of sufficient moisture, and drainage so that the tree will not be drowned out by a surplus of water. Mr. Davis says also that blasting cannot be done on this land because the hard-pan is too deep; that this hard-pan is very thick, six to forty-eight feet on this colony, and twenty feet on land adjoining where he had an opportunity to see it in a well pit. He says the eighteen inches of the twelve inches on top is very hard, and that below that it is stratified some, some softer, but, agriculturally, it is the same in its effect, namely, it holds the water. He says it cannot be blasted to do any good, because it is too deep to break through to find sufficient porousness in the ground to inject the water and to drain away, and to afford access to the roots. He says it cannot be done there because it is too deep. If it is shallow it may be [127] broken through. He says he has had seven years experience at Antelope, trying to raise fruit and almonds on shallow lands of the same general character. He said he made a dismal failure out of it. He says he was taught in school that five feet was

necessary. He said he was taught that at the university—your University. He said the authorities there maintained it. He was not asked what books, and he did not volunteer it. He further tells you that in this soil there is a lack of those essential elements, phosphoric acid and potash, especially for the fruit—not alone for the tree, but for the fruit. It is very deficient, he says, in both. Mr. Davis pronounced it as his opinion, based on his learning, that this land will not raise deciduous fruits in commercial quantities.

The defendant opposes that, and maintains that it will. It produces a number of witnesses here from Rio Linda who tell you their experience in growing trees out there. Some of them assuming to be raising fruit commercially, and others not. This district, you will remember, has been in progress for quite a number of years. I think the yellow book says it was 1912 when it commenced, or, rather, when the company sold its first tract to some customer. These witnesses tell you they find that the trees flourish all right, as far as they have tried it out, that crops are good. In some instances they have given you quantities. Of course, where a man says his crop is good, that is a general term. What he might mean by good might not mean good to another. But, as I say, some of them gave you quantities. Turkelson, I think, told you how much he had sold in one year. Some gave quantities, and some did not. Turkelson has been there some ten, or twelve, or fifteen years, my recollection is. [128]

Mr. Morley testified to his efforts on near-by land in Arcade. He tells you about other orchards, Fletcher, Wamser, Harris, and Holmes, all near by, that they had heavy crops. In his opinion it would grow successfully. These men that he mentioned, he says, had commercial orchards. It would have been more enlightening to you and of more value if the defendant called those men and let them tell you about their dealings with this land of theirs. They could have given you figures. It would not be the mere statement of somebody else that they looked good, or they produced a heavy crop, or the like. The defendant has not called them. You may take Mr. Morley's testimony in respect to it for as much as you think it worth, and no more. There is a rule of law that if a party produces weaker evidence when stronger evidence is available to him, the jury may take that into consideration in determining how much weight you will give to the weaker evidence. The men who own the orchards and grow the orchards would be better able to give results than some passerby or some caretaker who does not know the results through a series of years of handling the orchard. It is for you, however, to determine the weight to be given to any particular piece of evidence before you.

The defendant also presents Mr. Twining, who also may be taken as an expert. He tells you that Fresno, Sacramento, and other places on like lands raise deciduous fruits commercially, good crops, heavy crops, in certain large orchards and the like, when the land is properly prepared by blasting.

Apparently that, Gentlemen of the Jury, would indicate they agree with Mr. Davis that shallow soil of two or three feet is not enough, it takes more, because when the soil is only so deep Mr. Twining says they [129] blast the hard-pan in order to furnish a greater depth so the roots will go down and have their anchorage and their moisture as Mr. Davis says. Mr. Twining says it all becomes soil to a certain extent, in a general sense, when it is broken up. Mr. Twining says they must blast. He says it can be blasted through at Rio Linda. He says the hard-pan is only two or three inches deep, that is, that which is impervious and hard—perhaps it was a little more than that. He says that under that it is softer and it will break through the top and the roots will penetrate and go down. He says the hard-pan will absorb the water. Mr. Twining says the samples are only hardened soil; Mr. Davis says they are sandstone. They all agree that in the ditch where it has been exposed to water and air it still stands there. They both bring samples here from the ditch. You decide which is entitled to the greater weight. Mr. Twining says he analyzed the soils; Davis says he analyzed them. Now, Gentlemen of the Jury, if there is anything that is capable of being proven to almost an absolute certainty it is a mathematical problem or a chemical analysis, and why men should differ in their chemical analyses is one of conundrums that cannot be explained except on the theory that they did not take their samples fairly, either intentionally or unintentionally, or they did not analyze them

accurately, either intentionally or unintentionally, or that they did not honestly report the results to you. I cannot come to any other conclusion. Mr. Davis says that he found one-eighth to one-tenth of what Mr. Twining says he found. Putting it the other way, Mr. Twining says he found eight to ten times as much of those vital elements as Mr. Davis says he found. Now, because expert testimony presents so much difficulty, Gentlemen of the Jury, is one of the reasons why it has been sometimes suggested that it should be [130] left up to the Court in a case to appoint an expert who would make the test or the examination in a given case, and report it back to the Court. But that has not been done in this case, Gentlemen, each side has presented its own expert, and it is a question for you which one you will believe. Mr. Twining says that there is ample of these vital elements, phosphoric acid and potash, in this land, and that in his judgment it is well adapted to the growing of these deciduous fruits commercially after it is blasted, and the like, so the bottom soil will be broken up, and that the roots will go down.

Now, Gentlemen, that is the issue. By the greater weight of the evidence, taking it all, is it proven to you by the greater weight of the evidence that the land bought by the plaintiff is not well adapted to commercial orcharding. If you find that proven by the greater weight of the evidence, then you proceed to the next step. Plaintiff's case would be made out so far.

The next step is, did the defendant know that that it was false? As I say, having found it false, if you do, then the next step for you to determine is, did the defendant know it was false, or in reason ought he to have known it, or did it make this assertion positively, which is the equivalent of knowledge in the eyes of the law. If it did not know it, why shouldn't it have known it? It had handled these lands and dealt with them for fourteen years before it sold this land to the plaintiff. It had been advertising them as fruit-lands well adapted to orcharding. Its own name indicates its purpose —Suburban Fruit Lands Company—not Suburban Poultry Lands Company. It had its experts,—its horticultur*al*ists and others, and why wouldn't it know? It undoubtedly had access to chemists. Shouldn't it have [131] known if it did not know? Furthermore, it makes this assertion positively, taking the book for it, and taking the plaintiff's statements, if you do, as to what the agents told him. When a company or a man asserts positively that a thing is adapted to this or to that, is proven to be adapted to this or to that, he is bound to have the knowledge, and the law will not hear him to deny it. It is to be inferred that if it was false if he knew it was false. In legal contemplation, it is the equivalent. If you believe from the greater weight of the evidence that the defendant knew it was false, or should have known it, or made a positive assertion, that infers knowledge, and then you proceed to the next step, and that is, did the defendant make this statement with the intent that

the plaintiff should believe it and rely on it, and enter into the bargain to buy the land? Why did they put out advertising but to have the prospect believe it and come in and act on it and deal with them and buy? That is common sense. Remember that the law is not much more than common sense. Sometimes it is not as good as common sense. You can act pretty well on your common sense in dealing with these problems. What did these agents make that statement for? What was the book put out for, except to have the statement believed? So no reasonable person could come to any other conclusion, Gentlemen, than that the defendant wanted the plaintiff to believe those statements, and to act upon them and buy the land. The defendant, speaking through its agents, need not have in mind the gross idea, we will cheat, defraud, and deceive the plaintiff. No. All the intent necessary to impose liability upon the defendant is that it put out this advertising with the intent that it would be believed, that its agents made the statement with the intent that they would be believed and relied upon by the plaintiff, and acted [132] upon by him in entering into the bargain. So if you do find by the greater weight of the evidence that the defendant had this intent to influence the plaintiff to buy the land then you come to the next step, and that is, did the plaintiff believe it, and was he induced, in whole or in part, by reason of that, to buy the land. In asking yourselves that question, whether the greater weight of the evidence in respect to it is with the plaintiff, re-

member where the bargains were made, down in Omaha is where it started. He was a railroad brakeman. He did not know anything about California, or California fruit lands, or their values, or the method of growing fruit, or acquainted with the fruit industry—taking his statement for it, and there is nothing to the contrary, and that sounds reasonable. He says he believed what he was told by the agents. He says he believed the agents and he believed the representations in the book. Ask yourself why shouldn't he believe it in his condition? He was dealing with experts; the defendant held itself out as having expert knowledge. It advertised that it had experts—horticultur*al*ists, and the like. Now, it does not necessarily mean that you have to be a college graduate in order to be an expert. One of the witnesses testified here that he had not been through college, but that he was a horticultur*al*ist, a horticultural expert. It is not always necessary to have a college degree to have expert knowledge. The plaintiff visited the land before he made his first bargain. Remember, again, what he was, his ability, his occupation. He says he was taken out on the land by Braughlar, first. I think he did say that he was on the land a little while, two or three hours, and Braughlar came around and showed him two or three places, and took him somewhere else, up to Fair Oaks and elsewhere, and showed him lands. Finally, the plaintiff went to Oakland. [133] According to his statement, he had not seen any of these lands which he afterwards purchased. He came back

from Oakland and went out two or three times with the same agent of the defendant—Braughlar, again, I think, or with some agent of the defendant, and he says that he was on this first lot that he purchased. He bought two lots. He was on the first one only, and he gave it a casual looking over; he did not know anything about soil, or California lands, or fruits, and believing what the defendant told him was true that is all the investigation he made, and he did not discover that the representations were false, if you find they were false. Then he went back to Omaha and bought the first tract. He paid $4,000 for ten acres. You will treat it, Gentlemen, as though he has paid all the money. He has, in legal contemplation, *paid the* land. He gave his note and mortgage. Nobody knows where the note is. That is not in issue here. It will be paid eventually, that is to say, if you render a verdict for plaintiff that will be an offset in the judgment, that is, providing the defendant has the note. So you treat the case, in your consideration of it, just as if he paid the full amount. The pleadings show he paid nearly all of it. It was in June, 1926, he bought the first ten acres. In March, 1927, he bought a second piece for the same amount of money, ten acres, at $400 an acre. He says Gibson solicited him. It does not make any difference who solicited him; that is not important. Do not be diverted by little side issues in the case, except as they may affect the credibility of a witness. It does not matter whether the plaintiff hunted them up and bought the land, or whether they hunted

him up. The only question is was he induced *by* buy by false representations to his damage? Well, anyway, he bought the other ten acres, and then he came out here. [134] After that he said he found that he was cheated. Now, there is some conflict as to what was told to him about hard-pan, and all that. That does not amount to anything in the case, except in so far as it may affect the credibility of the witnesses, because the bargain had been made, the contracts had been closed, the deal was made, and if he was cheated he was, and if he was not cheated he was not, and that is all there is to it, and whatever was said after that would not affect the situation as of the time when he bought, at all. So you need not spend much time considering whether he or Braughlar was telling the truth as to the subsequent conversations, except in so far as it might have an effect upon the credibility of the two witnesses, respectively.

Part of the theory of the defense is that he did not buy this land for fruit raising, he would have bought it anyhow, he would have bought it for poultry. It is immaterial what the prime purpose was in buying, whether he intended to go into the fruit business, or into the poultry business, providing the representation that it was adapted to commercial orcharding had an influence on him to make the bargain. If he would have bought the land regardless of this representation as to its value for commercial orcharding, he was not damaged by that, and that does not amount to anything. But when one person makes a representation to another

to induce him to enter into a bargain, you cannot look into his mind and say how much influence one representation had, or how much influence another representation had, with much ease. He says he was influenced by it. If you buy a piece of land you are glad if it has many attributes of value, no matter what you intend to devote the use of it to. You are pleased and influenced ordinarily, by as many different purposes it can be put to, no [135] matter what purpose you intend to put it to. If you go out and buy a home in the outskirts, and the agent tells you, "This is a good home, it is worth the money, and I will tell you something else, in a few years there is going to be a railroad out here, or there is going to be an opera house and a hotel out here, and your land will be worth something more as a place for a store, or for a business purpose," and if you believe that, and that contributes to induce you to buy the place for a home, you have been cheated and defrauded, and the man is liable to you, even though you never build a store on it. So the plaintiff, here, may have been in the same situation. He says he was not coming here for poultry—that he was a single man, he was coming here to engage in orcharding eventually. And no matter what his purpose was, if it gave to the land an additional attribute of value in his estimation that in the future it might be devoted by him, or some one, to commercial orcharding, that is all the inducement that is necessary to enable him to recover in this action, if it induced him, in whole or in part, to enter into that bargain, the

representation that the land was well adapted to commercial orcharding, that is enough for his case. You need not stop to figure out whether he intended to raise fruit as the chief thing, or fruit as an incidental thing, or not. So if you believe from the greater weight of the evidence that the plaintiff did believe the representation that the land was well adapted to commercial orcharding, and that he did attach value to that, and it did have some influence in inducing him to buy the land, then the plaintiff has made his case thus far. Then the next step would be, it must appear that he was damaged. That, again, is an important matter. If the land was actually worth $400 an acre, no matter how many false representations were made to plaintiff, he would have received [136] as much in value as he paid for it. There is no legal damage, unless the land was worth at that time less than what he paid for it. So you are to determine, then, what is the value of the land. If you believe it was worth $400 an acre, then, of course, the defendant is entitled to your verdict. If you find it was worth less than $400 an acre, then the plaintiff is entitled to a verdict for the difference. You understand that. If it was worth $100 an acre, he would be entitled to a return of $300 an acre. If he gave that much money for something he did not get, he should have it back. The defendant is not entitled to keep it. If it was worth $200 an acre, he would be entitled to a return of $200 an acre. You will allow him the difference between what you find the land to have been worth when he bought it, as that

is the time of the test, and what he paid for it, which is conceded to be $400 an acre.

So, Gentlemen of the Jury, going back once more to the visit the plaintiff paid to the land before he bought any of it, remembering his condition, his vocation, his ignorance of California land and what was fruit land, and what was adapted to fruit, of course if he, by that inspection of the land that he made, would be apprised of the fact that the representation was false as to its adaptability to commercial orcharding, then, of course, he would not be entitled to recover, because he could not say he was deceived by the representation. But put yourself in his place; ask yourselves how much you would have learned, considering you were he, by coming on that land for the short time he did before he bought any of it, how much you would have learned in respect to its adaptability to commercial orcharding. Remember how the experts differ on that, and the tests they apply before they will say whether it is, or not, [137] and then ask yourselves whether the plaintiff did know, or ought to have known, that that representation was false. It must appear to you by the greater weight of the evidence, that the representation was false, and hence that he did not know that this land was adapted to commercial orcharding. So, if you find that these various elements of the plaintiff's case, viewing the evidence as a whole, are proven by the greater weight of the evidence, you will find for him. If you do not find that they are proven by the greater weight of the evidence, you will find

for the defendant. When you retire to the jury-room you will select one of your number foreman, and proceed to a verdict. It takes twelve of your number to agree upon a verdict in this case.

Any exceptions for the plaintiff?

Mr. WELSH.—None.

The COURT.—For the defendant?

Mr. BUTLER.—We except to the charge, and particularly to the instruction upon the subject of representations, manner of communication to the plaintiff. Also to the instruction regarding the false representations, and knowledge of falsity on the part of the defendant, and intent to deceive. Also the instruction upon the subject of the belief of the plaintiff of the truth of the representations, and the inducement and the reliance. Also upon the subject of damage. Also to that portion of the charge relative to the absence of certain witnesses, Harris, Wamser, and Holmes, and Fletcher.

The COURT.—Gentlemen of the Jury, it is late, and I am supposed to take a Saturday half-holiday to-day, I am going to leave the building. You will deliberate until you have arrived at a verdict, and when you have you will have it signed by your foreman, and seal it in an envelope, and it will be retained by [138] the foreman and then you can disburse to your homes, keeping secret, of course, the conclusion at which you have arrived, and return into court with your verdict next Monday morning at ten o'clock. Remember, Gentlemen, you do not disburse until you arrive at a verdict.

(Thereupon the jury retired, and subsequently

returned into court and rendered a verdict in favor of the plaintiff and against the defendant and assessed the damages in the sum of $3,000.00.)

Defendant proposes the foregoing as its bill of exceptions on appeal from the judgment in said cause, and prays that it be allowed and settled as such.

J. W. S. BUTLER,
Of the Firm of
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant.

Dated: November 23, 1928. [139]

[Title of Court and Cause.]

STIPULATION FOR SETTLEMENT OF BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correct and may be signed and settled as such upon appeal.

Dated: January 22, 1929.

MARTIN I. WELSH,
A. H. MORGAN,
Attorneys for Plaintiff.
J. W. S. BUTLER,
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant. [140]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions do not appear in the record of said cause, I, A. F. St. Sure, Judge of the District Court, upon the stipulation of the parties, have settled and signed the said bill, and have ordered that the same be made a part of the record of said cause, this 25th day of January, 1929.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Jan. 25, 1929. [141]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND COST BOND.

On the filing by defendant of a petition for appeal, with assignment of errors, and on motion of defendant, by its attorneys, IT IS HEREBY ORDERED:

That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered herein be, and the same is hereby, allowed.

AND IT IS FURTHER ORDERED that upon the giving by defendant of a good and sufficient bond, in the sum of Six Thousand ($6,000.00) Dollars, and conditioned as required by law and the

rules of this court, all further proceedings in the said court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals or by the Supreme Court of the United States, upon a petition for writ of certiorari.

IT IS FURTHER ORDERED that the amount of cost bond on said appeal be, and it hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned as required by law and the rules of this court.

The supersedeas and cost bond may be embraced in one document.

A. F. ST. SURE,
United States District Judge.

Dated: December 5th, 1928. [142]

Service hereof is hereby admitted and receipt of copy acknowledged this 7th day of December, 1928.

A. H. MORGAN,
MARTIN I. WELSH,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 7, 1928. [143]

[Title of Court and Cause.]

SUPERSEDEAS BOND AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Sacramento Suburban Fruit Lands Company, a corporation organized and existing under

the laws of the State of Minnesota, as principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, and authorized under the laws of the State of California and the above-entitled district, to act as sole surety on undertakings of this character, as surety, are held and firmly bound unto Frank L. Hayes, the above-entitled plaintiff, in the full and just sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, to be paid to the said Frank L. Hayes, his attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of December, 1928.

WHEREAS, lately at a District Court of the United States [144] for the Northern District of California, Northern Division, Second Division thereof, in a suit pending in said court between said Frank L. Hayes, as plaintiff, and Sacramento Suburban Fruit Lands Company, as defendant, a judgment was rendered against the said Sacramento Suburban Fruit Lands Company in the sum of Three Thousand ($3,000.00) Dollars, and in the further sum of costs amounting to $22.50, and the defendant having been allowed an appeal from the judgment to the United States Circuit Court of Appeals for the Ninth Circuit; and the Court having made an order for supersedeas staying all

proceedings in the District Court pending final determination of said appeal, provided the defendant give a bond in the sum of Six Thousand ($6,000.00) Dollars, conditioned according to law; and the Court having fixed the amount of cost bond on said appeal in the sum of Two Hundred Fifty ($250.00) Dollars, and the Court having ordered that the supersedeas bond and bond for costs might be combined and embraced in one document,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Sacramento Suburban Fruit Lands Company shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

AND IT IS FURTHER EXPRESSLY AGREED by said surety that in case of a breach of any condition hereof, the above-entitled court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the action in which this bond is given to ascertain the amount which said surety is bound to pay on account of such breach, and to render judgment therefor against it and to award execution therefor.

IN WITNESS WHEREOF, said principal and surety have executed this undertaking, attesting such execution by their respective seals, [145] all on this the 8th day of December, 1928.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation.

[Seal] By A. E. WEST.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation,

[Seal] By J. W. S. BUTLER, Attorney-in-fact.

State of California,
County of Sacramento,—ss.

On this 8th day of December, 1928, before me, a notary public in and for the County of Sacramento, State of California, personally appeared J. W. S. Butler, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Standard Accident Insurance Company, and he acknowledged to me that he subscribed the name of Standard Accident Insurance Company thereto, as principal, and his own name as the attorney-in-fact.

[Seal] GERALD M. DESMOND,
Notary Public in and for the County of Sacramento, State of California.

Form of bond and sufficiency of sureties approved.

Dated: Dec. 11, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 12, 1928. [146]

[Title of Court and Cause.]

ORDER TRANSMITTING EXHIBITS.

It appearing to the Court that the exhibits of plaintiff and defendant, except the perishable exhibits and samples of hard-pan, should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit in their original form,—

IT IS HEREBY ORDERED that said exhibits, except the perishable exhibits and samples of hard-pan, be transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit in original form, with the bill of exceptions, and need not be printed as part of the record herein.

Dated: January 24, 1929.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Jan. 25, 1929. [147]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare a record on appeal containing true copies of the following papers in the above-entitled action:

1. Order removing said cause from the Superior Court of the State of California to the District Court of the United States.

2. Complaint.
3. Demurrer to complaint.
4. Order overruling demurrer.
5. Answer.
6. Minutes of trial.
7. Verdict of the jury.
8. Judgment.
9. Petition for appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Order allowing appeal.
13. Citation.
14. Supersedeas and cost bond.
15. Order transmitting exhibits.
16. Praecipe for transcript.

J. W. S. BUTLER,
BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Defendant and Appellant. [148]

Service hereof is hereby admitted and receipt of copy acknowledged this 28th day of January, 1929.

A. H. MORGAN,
MARTIN I. WELSH,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 28, 1929. [149]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 149 pages, numbered from 1 to 149, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Frank L. Hayes vs. Sacramento Suburban Fruit Lands Co., No. 485—Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Sixty-three and 20/100 ($63.20) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 1st day of Feb., A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [150]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Frank L. Hayes, Appellee, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Sacramento Suburban Fruit Lands Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated: This 5 day of December, A. D. 1928.

A. F. ST. SURE,
United States District Judge.

Due service of within citation is hereby admitted this 7th day of December, 1928.

A. H. MORGAN,
MARTIN I. WELSH,
Attorneys for Appellee.

Citation on Appeal. Filed Dec. 7, 1928. [151]

[Endorsed]: No. 5707. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Suburban Fruit Lands Company, a Corporation, Appellant, vs. Frank L. Hayes, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed February 2, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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No. 5707

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

FRANK L. HAYES,
Appellee.

BRIEF FOR APPELLANT.

BUTLER, VAN DYKE & DESMOND,
Capital National Bank Building, Sacramento,
EDWARD P. KELLY,
Metropolitan Bank Building, Minneapolis,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 5707.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

FRANK L. HAYES,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an action based upon allegations of fraudulent representations in the sale of twenty-two acres of land in the Rio Linda District, north of Sacramento City, California.

The complaint, which appears on pages 1 to 11 of the Transcript, counts upon two causes of action separately stated,—one concerning the purchase of a twelve acre tract of land, and the other, concerning, the later purchase of a ten acre tract of land.

The same representations are said to have been made as to both transactions. They are in substance, that the land was represented to be worth $400 an acre; to be rich and fertile and capable producing all sorts of farm crops and produce; to be free from

all conditions and things injurious or harmful to the growth of fruit trees; to be perfectly adapted to the raising of all kinds of deciduous fruits in commercial quantities; and capable of producing large crops of the finest quality of all kinds of deciduous fruits planted thereon; that the land was the same quality as other land in the vicinity thereof which has proven to be rich and productive and capable of producing large and profitable crops of all kinds of farm produce and particularly of large and profitable crops of deciduous fruits.

Plaintiff was a resident of Omaha, Nebraska, and traded in upon the purchase price of the California land certain real property owned by him there.

He alleges these representations were all false, stating as to the representations of value that the actual value of the land was only $25.00 an acre, or about one-sixteenth of its represented value.

To the complaint a demurrer was interposed and overruled, and after an answer was filed, the cause was tried to a jury which rendered a verdict in favor of plaintiff in the sum of $3000. This appeal is taken from the judgment entered on the verdict and presents the following questions:

Error of the Court in overruling demurrer, and that the complaint does not state a cause of action;

Error in the Court's instructions to the jury.

SPECIFICATION OF ERRORS RELIED UPON.

(1) The Court erred in overruling demurrer to the complaint, and complaint does not state a cause of action.

(See Assignment of Errors, page 28 of the Transcript, Assignment No. I.)

(2) The Court erred in instructing the jury as to the representations alleged to have been made by defendant.

(See Assignment of Errors, page 29 of the Transcript, Assignment No. III.)

(3) The Court erred in instructing the jury on the question of the falsity of the representations alleged to have been made by defendant.

(See Assignment of Errors, page 31 of the Transcript, Assignment No. V.)

(4) The Court erred in instructing the jury on the question of plaintiff's reliance on the alleged representations.

(See Assignment of Errors, page 33 of the Transcript, Assignment No. VII.)

(5) The Court erred in instructing the jury on the question of damages.

(See Assignment of Errors, page 36 of the Transcript, Assignment No. VIII.)

(6) The Court erred in instructing the jury in relation to the absence of Harris, Wanzer, Holmes and Fletcher, as witnesses.

(See Assignment of Errors, page 37 of the Transcript, Assignment No. IX.)

ARGUMENT.

THE COURT ERRED IN OVERRULING DEMURRER TO THE COMPLAINT, AND COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

The representations alleged to have been made were matters of opinion only. It is to be noted that with regard to the quality of the soil the representations were most vague and uncertain, and if made according to the allegations of the complaint, were couched in superlatives such as would convincingly stamp them as "trade talk" only. The statements that the land is rich and fertile and capable of producing all sorts of farm crops and products, do not amount to statements of fact. No land on the face of the earth will produce all sorts of farm crops and products. When that statement was made to appellee he knew it was not a statement of fact. (Of course, appellee failed to prove that such a statement was made, but we are here discussing his pleading.)

Again, no land is entirely free from all conditions and things injurious or harmful to the growth of fruit trees. Every orchardist has to combat conditions of the soil injurious to the growth of his trees. That is one of the things that goes with horticulture.

Again, no land is perfectly adapted to the raising of fruits of all kinds in commercial quantities. Such a statement by a prospective vendor to a prospective vendee would be so silly as to preclude the idea that it was a statement of fact. No land is capable of producing large crops of any kind of deciduous fruit planted thereon. To allege that such a statement was advanced as a statement of fact is absurd.

Again, no land produces crops at all times of the finest quality. Such an achievement has probably never been accomplished in all the history of horticulture. Now these statements were not made to a man who was proposing to pay money for the property referred to. This transaction was a trade. Mr. Hayes owned property which he alleges to have been worth $12,600.00, and he traded it upon that basis.

It should be remembered that this man after the representations were made to him concerning the quality and value of these lands, made an inspection trip and began an investigation touching the truth or falsity of these statements.

Under these circumstances we submit that the statements were matters of opinion only and not representations of fact, and that therefore the complaint fails to state a cause of action.

On this matter we therefore refer the Court to the following cases:

Rendell v. Scott, 70 Cal. 514;
Andrus v. St. Louis S. & R. Co., 130 U. S. 645;
Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315;
Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379;
Kimber v. Young, 157 Fed. 744, 70 C. C. A. 178, Colo. Case;
Everist v. Drake, 145 Pac. 814;
Hackleman v. Lyman, 50 Cal. App. 326-327;
12 *R. C. L. pages* 279-281;
26 *Corpus Juris,* 1215-1217;

Southern Development Co. v. Silva, 125 U. S. 259;

Halton v. Noble, 83 Cal. 7;

Gleason v. McPherson, 175 Cal. 594;

Wooleson v. Coburn, 63 App. 523.

In the case of *Rendell v. Scott,* 70 Cal. 514, the Court said:

> "It is apparent to us that the matters alleged as constituting the fraud were matters of opinion rather than of facts. It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in Ione Valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits; and the other matters alleged may well be classed under the head of matters of opinion rather than a false representation of facts. There is no averment which excludes the idea of personal inspection by the purchaser."

In *Parker v. Moulton,* 114 Mass. 99, 19 Am. Rep. 315, the Court said:

> "The affirmations here set forth as between buyer and seller it has been repeatedly decided, will not support an action, although the defendant knew them to be false when made. They concern the value of the land or its condition and adaptation to particular uses which are only matters of opinion and estimate as to which men may differ. To such representations the maxim Caveat emptor applies. The buyer is not excused from an examination, unless he be fraudulently induced to forbear inquiries which he would otherwise have made."

In *Ellis v. Andrews,* 56 N. Y. 83, 15 Am. Rep. 379, the Court said:

> "Upon questions of value, the purchaser must rely upon his own judgment; and it is his folly to rely upon the representations of the vendor in that respect * * * In Van Epps v. Harrison, 5 Hill. 63 (40 Am. Dec. 341) it is stated as undoubted law that an action will not lie by a purchaser against a vendor upon false and fraudulent statements of the value of the property sold, made while negotiating the sale. This was concurred in by the entire Court."

We submit that the demurrer should have been sustained, and that that complaint does not state a cause of action.

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE BY DEFENDANT.

The charge of the Court upon this matter appears on pages 29-30-31 of the Transcript. Without repeating them in verbatim we wish to call the Court's attention to certain of the statements therein made by the Court in respect of the booklets introduced in evidence being plaintiff's exhibits Nos. 1 and 2.

Concerning the statements in this literature the Court told the jury as matters of law that they were representations of fact; that the particular lots purchased by plaintiff were well adapted to successful commercial orcharding, and that the lands were very rich and fertile and highly productive. These booklets were given to a man who intended to go out and inspect the property and did go out and select out of the many thousands of acres offered for sale, twenty-two acres thereof. Statements of the booklet are

general statements only, as we have hereinbefore argued. Under such circumstances under which they were made, that is, to a man intending to make his own investigation, they were statements of opinion only, and the Court should not have told the jury that they were representations of fact. But certainly, if they be held not to be statements of opinion as matters of law, they are clearly such general statements concerning matters about which all men may differ, and made under such circumstances, that the question of whether or not they were statements of opinion or statements of fact should have been submitted to the jury for decision under appropriate instructions to that end. The Court took this matter from the jury and told them that these statements were representations of fact and in so doing we submit the Court erred.

The instructions were duly excepted to, (Page 156 of the Transcript.)

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF THE FALSITY OF THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE BY DEFENDANT.

This instruction appears on pages 31-32 of the Transcript and reads as follows:

> "The next step is, did the defendant know that it was false? As I say, having found it false, if you do, then the next step for you to determine is, did the defendant know it was false, or in reason ought he to have known it, or did it make this assertion positively, which is the equivalent of knowledge in the eyes of the law. If it did not know it, why shouldn't it have known it?

> It had handled these lands and dealt with them for fourteen years before it sold this land to the plaintiff. It had been advertising them as fruit lands well adapted to orcharding. Its own name indicates its purpose—Suburban Fruit Lands Company—not Suburban Poultry Lands Company. It had its experts,—its horticulturalists and others, and why wouldn't it know? It undoubtedly had access to chemists. Shouldn't it have known if it did not know? Furthermore, it makes this assertion positively, taking the book for it, and taking the plaintiff's statements, if you do, as to what the agents told him. When a company or a man asserts positively that a thing is adapted to this or to that, is proven to be adapted to this or to that, he is bound to have the knowledge, and the law will not hear him to deny it. It is to be inferred that if it was false he knew it was false. In legal contemplation, it is the equivalent."

This instruction was argumentative in the extreme. It really takes the question of the knowledge of the falsity from the jury. We do not think there can be any doubt but that the jury felt they had been instructed that there was no question as to knowledge if they found the representations false. The Court even told the jury that before making such statements the appellant should have had the land analyzed by chemists and inferentially that if they did not do this and made statements as to fertility and thereafter chemical analysis should show that any element of fertility was lacking they would be chargeable with the knowledge of this, because they had made the statements appearing in the booklet.

The Court said, "It is to be inferred that if it was false he knew it was false. In legal contemplation, it

is the equivalent." The Court even went to the length of telling the jury that the name of the defendant was evidence of the purpose of defendant in selling the land. It said, "Its own name indicates its purpose—Suburban Fruit Lands Company—not Suburban Poultry Lands Company." We submit such a remark was entirely uncalled for. The statements referred to were concerning the adaptability of the land for a certain use and were general statements as to its fertility. It was in evidence that many people still think this land to be fertile and adapted to fruit culture. We submit the Court erred in practically telling this jury that if they believed these statements untrue they should as matters of law find when the defendant made them it knew them to be false.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF PLAINTIFF'S RELIANCE ON THE ALLEGED REPRESENTATIONS.

These instructions are too long to repeat verbatim. They appear on pages 33 to 36 of the transcript. They were extremely argumentative. For instance, the Court referred to plaintiff's statements that he knew nothing about California land or California, or its land values, and continued, "He says he believed what he was told by the agents. He says he believed the agents and he believed the representations in the book. Ask yourself why shouldn't he believe it in his condition? He was dealing with experts; the defendant held itself out as having expert knowledge. It ad-

vertised that it had experts—horticulturalists, and the like." (Page 34 of the Transcript.)

The Court minimized the effect of plaintiff's inspection trip as follows:

> "The plaintiff visited the land before he made his first bargain. Remember, again, what he was, his ability, his occupation. He says he was taken out on the land by Braughler, first. I think he did say that he was on the land a little while, two or three hours, and Braughler came around and showed him two or three places, and took him somewhere else, up to Fair Oaks and elsewhere, and showed him lands. Finally, the plaintiff went to Oakland. * * * He was on the first one only, and he gave it a casual looking over; he did not know anything about soil, or California lands, or fruits, and believing what the defendant told him was true that is all the investigation he made, and he did not discover that the representations were false, if you find they were false."
>
> (Pages 34-35 of the Transcript.)

We have hereinbefore cited the Court to authorities covering the question of the right of persons to rely upon representations made by the seller of the property where after representations were made he commences an investigation. Under such circumstances he is presumed not to rely upon the representations and he is chargeable with such knowledge as an ordinarily prudent man would discover making a prudent investigation into the truth or falsity of the statements made to him. Let us just consider one of these statements,—that as to the value of the land. He had been told that the land was worth $400.00 per acre. His witness testified that it was worth but $50. He comes to the community where the land is situated and be-

gins an investigation into the truth or falsity of these statements as to value. He knows that he is ignorant of the values and makes the inspection of the land by himself, and is not informed of the value of the land because of that ignorance. Consequently, he will ask those qualified to tell him of the value of the land, and will not ask that question of the seller whose statements he is investigating. What does the Court have to say about these matters? As we have hereinbefore pointed out, in its charge to the jury, the Court, contrary to the law as laid down in authorities hereinbefore cited, makes the ignorance of the buyer an excuse for his not having found out the truth about these matters.

The Court says nothing about his investigation of values. Of course, it would be difficult to excuse that. It must be admitted that any investigation as to the matter of values, involving as it must, inquiry of those qualified to speak, would have discovered the falsity of that statement if it was made to him as he said it was. Plaintiff nowhere testified that he had ever asked any questions about the value, although that was the most material statement made to him, and one upon which he claimed to be relying. So we submit that the Court's instruction upon this matter of reliance was against the law, and unfair and prejudicial to the defendant.

THE COURT ERRED IN INSTRUCTING THE JURY ON THE QUESTION OF DAMAGES.

The Court instructed the jury on this matter as appears on page 36 of the transcript as follows:

> "Then the next step would be, it must appear that he was damaged. That, again, is an important matter. If the land was actually worth $400 an acre, no matter how many false representations were made to plaintiff, he would have received as much in value as he paid for it. There is no legal damage, unless the land was worth at that time less than what he paid for it. So you are to determine, then, what it the value of the land. If you believe it was worth $400.00 an acre, then, of course, the defendant is entitled to your verdict. If you find it was worth less than $400 an acre, then the plaintiff is entitled to a verdict for the difference. You understand that. If it was worth $100 an acre, he would be entitled to a return of $300 an acre. If he gave that much money for something he did not get, he should have it back. The defendant is not entitled to keep it. If it was worth $200 an acre, he would be entitled to a return, of $200 an acre. You will allow him the difference between what you find the land to have been worth, when he bought it, as that is the time of the test, and what he paid for it, which is conceded to be $400 an acre."

Therein the Court told the jury that the plaintiff had paid $400 for the land and that his damage was the difference between that sum and the actual value, per acre, as the jury should, from the evidence, determine it to be. Herein the Court erred for the proof was the following.

Plaintiff alleged in his complaint that he had traded property for the lands he bought, and there was no evidence introduced by him tending to prove that the

property he had turned in was worth the amount which in his complaint he alleged it to have been worth. True, appellant's property had gone in on the basis of $400 per acre and appellee's property had gone in on a basis of $12,600, less $7,136.39 mortgages. But the true measure of appellee's damages was the difference between the value of the property purchased by him and the value of that which he had given in exchange; not the difference between the value of the property he bought and the sum of $400, the trade figure at which that deal had been figured out.

This instruction compelled the jury to find that appelee's property should be treated as a cash payment equal to the alleged value as stated in his complaint, and this, in the absence of any testimony as to its worth, a matter upon which the answer of the defendant raised an issue.

An illustration: Let us suppose that the actual value of appellee's equity in his property amounted to $2000, and the additional money he agreed to pay amounted to $3600, as it approximately would. He would have been paying a total of $5600 for the property, and his damages would be the difference between the actual value, which according to his witness, was $50 per acre, or a total of $1100, and the sum of $5600, or a net damage of $4600, but under the Court's instruction this actual value of $1100 would be subtracted from $8800, leaving him a net damage of $7700. In short, the Court assumed, as proven without any evidence and against the issue,

that plaintiff had paid $400 an acre for the land and as a matter of fact the proof did not show that. The Court should have told the jury to find the value of the property which plaintiff had traded in, and from that sum subtract the actual value of the property he got. But the Court ignored the question of the value of the property he gave, assuming it without any evidence to that effect to have been worth the full amount alleged in plaintiff's complaint and told the jury in effect to add to that value the additional cash price and subtract from the sum the actual value of the land.

The instruction was erroneous, and was, of course, prejudicial. Its giving was duly excepted to. (Page 156 of the Transcript.)

THE COURT ERRED IN INSTRUCTING THE JURY IN RELATION TO THE ABSENCE OF HARRIS, WANZER, HOLMES AND FLETCHER, AS WITNESSES.

The instruction of the Court on this matter appears on page 37 of the transcript, and reads as follows:

> "Mr. Morley testified to his efforts on nearby land in Arcade. He tells you about other orchards, Fletcher, Wanzer, Harris, and Holmes, all nearby, that they had heavy crops. In his opinion it would grow successfully. These men that he mentioned, he says, had commercial orchards. It would have been more enlightening to you and of more value if the defendant called these men and let them tell you about their dealings with this land of theirs. They could have given you figures. It would not be the mere state-

ment of somebody else that they look good, or they produced a heavy crop, or the like. The defendant has not called them. You may take Mr. Morley's testimony in respect to it for as much as you think it worth, and no more. There is a rule of law that if a party produces weaker evidence when stronger evidence is available to him, the jury may take that into consideration in determining how much weight you will give to the weaker evidence. The men who own the orchards and grow the orchards would be better able to give results than some passerby or some caretaker who does not know the results through a series of years of handling the orchard. It is for you, however, to determine the weight to be given to any particular piece of evidence before you."

The witness, Morley, had been called to the stand to testify, (pages 98-106 of the Transcript), and had testified concerning the crops grown upon lands similar to the lands of appellee in the general vicinity, which lands were devoted to horticulture and were under the care of the witness. The owners' names were Harris, Wanzer, Holmes and Fletcher. The owners were not called to testify. It does not appear whether or not they were available. Certainly it could not be assumed that they were. Yet the Court assumed that they were available, and therefore, that because appellant did not produce them the jury could apply the rule as to Morley's testimony, that the testimony of the owners would be less favorable to the appellant, and that for that reason the owners were not produced.

There was no foundation for these derogatory remarks of the Court in respect of the witness Morley's testimony, and of the assumed failure of appellant to present better evidence, and of an ulterior motive in

not producing it. The comments could not have failed to have had a bad effect upon the jury and to have discredited both plaintiff and its witness, Morley. The matter was made the subject of exception and we submit constitutes error. (Page 156 of the Transcript.)

We ask that the judgment be reversed.

Respectfully submitted,

BUTLER, VAN DYKE & DESMOND,
EDWARD P. KELLY,
Attorneys for Appellant.

/ /

No. 5707

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),
Appellant,

vs.

FRANK L. HAYES,
Appellee.

BRIEF FOR APPELLEE.

MARTIN I. WELSH,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO.

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Appellee.

BRIEF FOR APPELLEE.

THE COMPLAINT STATES A CAUSE OF ACTION AND THE COURT DID NOT ERR IN OVERRULING THE DEMURRER.

Appellant attacks the sufficiency of the complaint generally, solely on the ground that the allegations of the complaint show on the face thereof that the representations were not of material fact, but that they were in the nature of "sales talk" or matters of opinion. It is argued in effect, that since the complaint alleges that defendant falsely represented to plaintiff that the land in question was capable of producing *all sorts* of farm crops and products, and that the land *was entirely free* from *all* conditions and things injurious and harmful to the growth of fruit trees, and that the land was perfectly adapted to the

raising of deciduous fruits of *all kinds* in commercial quantities,—that the plaintiff was bound to know, and that it must be held as a matter of law that he did know, that the representations made were false and were not intended as representations of fact and that he had no right to rely upon them, and that therefore appellee has failed to state a cause of action.

(a) The record shows that the demurrer was overruled by consent. (Tr. p. 16.) Nor was there any exception taken to the above ruling of the demurrer,—nor, indeed, could an exception very well be taken to a ruling which appellant stipulated might be made. Exception must be taken to the overruling of a demurrer or else error in such ruling, if any there was, is deemed to be waived. *(G. A. I. Co. v. Hall,* 219 U. S. 307.)

(b) In counsel's argument on the merits of the demurrer they depart from the record and state the following facts which they seem to assume to be matters within the common knowledge of all and of which they apparently assume the court will take judicial knowledge of: that no land on earth will produce all sorts of farm products; that no land is entirely free from all conditions and things injurious or harmful to the growth of fruit trees; that every orchardist must combat conditions of the soil injurious to the growth of his trees; that no land is perfectly adapted to the raising of deciduous fruits of all kinds in commercial quantities; that no land is capable of producing large crops of any kind of deciduous fruits.

Next in their argument on this point, they depart entirely from the complaint, and make the statement

that no land produces crops *at all times* of the finest quality. Suffice it to say that there is no such allegation in the complaint.

Again they depart from a consideration of the complaint itself, and point out that the plaintiff came to California on a tour of inspection, which, we submit, has nothing to do with the sufficiency of the complaint, whatever bearing that may have on the proof of his cause of action, for that fact does not appear in the pleadings.

(c) As hereinabove pointed out, the appellant stipulated that the demurrer might be overruled and the case thereafter went to trial and evidence was introduced and the case tried on the theory that representations were made to the appellee that the land in question was adapted to the growing of deciduous fruits in commercial quantities; that it was rich and fertile; that it had proven to be adapted to the growing of fruit in commercial quantities; that it was as well adapted therefor as other land in the vicinity which had proven to be well adapted to the growing of such fruit; that the land was worth the amount of the contract price; and that the appellee was a resident of Nebraska at the time of the transactions and was compelled to and did rely upon all of the said representations. And evidence on all of the above mentioned phases of the case was introduced *without objection.* That being the case, we submit that plaintiff may not now raise the point that the complaint is defective.

Nashua Savings Bank v. Anglo American, 48 L. Ed. 782.

(d) So far as the allegations of the complaint as to the representations made to the appellee are concerned (and it is only as to the materiality of the representations alleged to have been made that the complaint is attacked in the argument of counsel), the allegations that the appellee was a resident of the State of Nebraska and was compelled to and did rely upon all of the representations made, followed by the allegations concerning the misrepresentations as to the value of the land,—alone, states a cause of action. In addition to the above allegations, the complaint avers that the defendant in error was not at all familiar with California lands; and then follow the allegations concerning the misrepresentations as to the quality and adaptability of the land. That such representations made under the circumstances alleged, are as to matters of fact and not of opinion only is supported by a vast number of cases. On the subject we cite the following:

Powell v. Oak Ridge Orchard Co., 84 Cal. App. 714;
Dickey v. Dunn, 80 Cal. App. 724;
Harris v. Miller, 196 Cal. 8;
Smith v. Low, 18 Fed. (2nd) 817;
French v. Freeman, 191 Cal. 579;
Stone v. McCarthy, 64 Cal. App. 158;
Teague v. Hall, 171 Cal. 668;
Herdan v. Hansen, 182 Cal. 538;
Cross v. Bouch, 175 Cal. 253;
Seimer v. Dickinson, 299 Fed. 651;
Scott v. Delta Land & Water Co., 57 Cal. App. 320.

We do not propose to take up the time of the court with a lengthy discussion of all of the above cited cases. We shall, however, take up a few of the above mentioned cases in which the facts alleged and proved were very similar to those in the instant case.

In the case of *Scott v. Delta Land & Water Co.*, 57 Cal. App. 320, the complaint alleged and the court found that the defendant falsely represented to the plaintiff, among other representations, that the land in question was of the *best* quality; that it was fertile in *every* respect; that it was *free* from alkali and noxious weeds; that it was suitable for the growing thereon of *all kinds* of crops of hay, grain and vegetables. There were other misrepresentations alleged and found by the court, that the upper court conceded might not be considered representations of material fact. But as to the above mentioned and certain other alleged representations, the upper court held that the judgment might be sustained on evidence supporting *any one* of said alleged misrepresentations.

The court in sustaining the judgment of the lower court held that the representations made were of material fact and not of opinion; that although the plaintiff was himself a farmer, yet since a chemical test was necessary to determine the quality of the soil, the mere fact that he was on the land before the transaction was entered into, had no bearing on his right to recover, for obviously he could not detect its quality by merely seeing it.

In the case of *Powell v. Oak Ridge Orchard Co.* (supra), one of the grounds of appeal was that the evidence did not support the findings. Following the

averments of the complaint, the court found that the plaintiff had been induced to enter into the contract through the following false representations made by the defendant with intent to induce plaintiff to enter into the contract; that the property was of the reasonable value of $4500.00; that the land was free from hardpan under or near the surface of the soil; that there was no hardpan in the district in which the land was situated; that the land was particularly productive and was the best orchard and farm land, and that the soil was particularly adapted to the raising of fruit. It was further found in conformity to the allegations of the complaint that all of the above representations were false; that the same were made with intent to induce plaintiff to enter into the contract; that the true facts were that the land was underlaid with hardpan from eight to fourteen inches below the surface; that the land was situated in a district where hardpan generally existed; that very little of the land was suitable for the raising of fruit; that it was not worth more than $1500.00 at the time of the contract; that the plaintiffs had had no previous experience as farmers or orchardists or in dealing in farm lands, and knew nothing of the value or character of land, and that in entering into the transaction they relied wholly upon the representations made by the defendant.

The evidence showed that the plaintiff Powell had for many years prior to the time of entering into the contract been a railway man and knew nothing of fruit raising or of the productivity or fertility of soil. With the intention of retiring from railway service

and going into the business of fruit raising, *he visited the property* in question. Defendant's agent went over the property with the plaintiff, and during that tour of inspection made the representations set forth in the findings.

About a year and a half later the contract was entered into, the trees began to die, whereupon the plaintiff, accompanied by soil experts, tested the land and found the same to be underlaid with hardpan, as set forth in the findings. Experts testified that the land was of little or no value for fruit raising. There was also evidence that the land was of no greater value than the court found it to be.

It was held that the evidence amply supported the findings of fact by the court, and in effect the court held that there was sufficient evidence to support the finding that the representations as to the value of the land, of its productivity and fertility and of it being free from hardpan,—were and each of said representations was representations of material fact upon which the plaintiff had the right to rely, even though he was on the land himself and made a tour of inspection of same before he entered into the contract.

In so holding, the court (page 718) quoted with approval the language of the court in the case of *Dickey v. Dunn*, 80 Cal. App. 724:

> "* * * The evidence shows that the plaintiff, who was by trade a watchmaker, had no knowledge of the soil conditions and *was without sufficient experience to determine the truth of the representations.* Where a purchaser is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him

> (*Teague v. Hall,* 171 Cal. 668), and while it appears that the plaintiff visited the property before the transfer was made, the evidence sufficiently supports the findings that he relied upon the representations, *both as to its value and character.* The statements as to the character of the soil and as to the water supply were clearly misrepresentations of fact. (French v. Freeman, 191 Cal. 579; Stone v. McCarthy, 64 Cal. App. 158.). *A statement as to value is not always made as a mere expression of opinion. It may be a positive affirmation of fact intended as such by the party making it, and reasonably regarded as such by the party to whom it was made;* and when it is such it is like any other representation of fact, and may be fraudulent representation warranting rescission. * * *" (Italics ours.)

(e) The numerous cases cited by appellant in support of its argument on this point do not support its contention. We will briefly review the California cases cited.

1. *Rendell v. Scott,* 70 Cal. 514. The decision is very short and all of the allegations of the complaint are not set out. The court held that the demurrer to the cross-complaint was properly sustained, giving as a reason that there was no averment excluding personal inspection on the part of the vendee, and that in absence of such averment, allegations to the effect that the defendant represented that the land in question was the best in Ione Valley; that the same was very rich and productive; that a part of the land was rich in mineral deposit; a part thereof good alfalfa land and another portion would produce fifty bushels of wheat to the acre,—must be considered statements of opinion only.

In the instant case, the complaint does exclude personal inspection on the part of the plaintiff, in that it is alleged that at the time of the contract, plaintiff was a resident of Nebraska and was compelled to and did rely solely upon the representations of the defendant.

Furthermore, as hereinabove pointed out, there are innumerable later cases holding that representations as to the quality and productivity of land, where the same are made positively as statements of fact, will be considered representations of material fact and not matters of opinion only.

Scott v. Delta Land & Water Co., supra;
Powell v. Oak Ridge Orchard Co., supra;
Dickey v. Dunn, supra;
Herdan v. Hanson, supra;
French v. Freeman, supra.

2. In the case of *Hacklemand v. Lyman*, 50 Cal. App. 323, the plaintiff had been a resident of the district where the land was situated for many years. Certain misrepresentations were alleged to have been made by the defendant to the effect that the land in question had had water over it in the past; that about 25 acres thereof was irrigable and could be put into crop immediately after suitable ditches had been constructed. By the plaintiff's own testimony after the alleged representations were made, he went upon the land with an expert, who advised him that in his opinion water never had been on the land, and that while it was his opinion that the land was too high to be irrigated, yet that fact could not be determined without a survey of the land. The court held that since

the plaintiff went upon the land with an expert for the purpose of investigating and inquiring into the facts concerning which the representations were made, it would be presumed that he did not rely upon the representations of the defendant.

The court states the rule, (page 326):

> "If a purchaser of real estate visits the property prior to the sale and makes a personal examination of it *touching representations* as to its quality, character, or condition, he will be presumed to rely, not upon the representations, but upon his own judgment in making the purchase provided the vendor does nothing to prevent his investigation being as full as he chooses." (Italics ours.)

3. The case of *Holton v. Noble,* 83 Cal. 7, merely held that representations by the plaintiff that the land in question would produce a certain amount of produce per acre were expressions of opinion and were not sufficient to ground a defense of fraud. The circumstances under which the statements were made are not set forth in the opinion. Our comment on the case of *Rendell v. Scott* (supra) applies with equal force to this case.

4. In the case of *Gleason v. McPherson,* 175 Cal. 594, the only representations actually made by defendants themselves were that the bonds which were the subject matter of the contract, were gilt edge, that they were safe, a good investment, and that the principal would be duly paid. These statements were, as the court expressed it, "avowedly based on the aforesaid statement for December, 1907, and the two letters of McPherson and Englebrecht, both of which were shown

to Gleason as the foundation thereof." The judgment of nonsuit was affirmed. In this case, there was no evidence even tending to show that defendants did not have reasonable grounds for believing their statements to be true.

5. In the case of *Woolson v. Coburn,* cited by plaintiff in error, defendant set a defense of fraud to an action for specific performance of a contract to convey land.

The alleged false representations were that the plaintiff had represented that a certain tract of land involved consisted of 120 acres, whereas there was only 110 acres in the tract; and the further representation that springs of water on said land would begin to flow when the rains came and would continue to flow for about eight months each year.

As to the representation concerning the size of the tract, the court held that there was sufficient evidence to support the finding that plaintiff knew at the time of entering into the contract that the tract was in fact only 110 acres in size.

As to the second alleged misrepresentation, the lower court found that the plaintiff had stated to defendant that for a number of years said springs had started to flow from the time the rains came and had continued for about eight months each year, and that it was his opinion that the same would continue. The upper court held that the evidence amply supported the finding that plaintiff's statement concerning past year in regard to the springs was true. As to the prediction of defendant concerning the future flow of the springs, the court said (page 323):

> "* * * That part of the representation which refers to the future—that wherein respondent's son told appellant that 'in the winter months when there is rain there will be plenty of water for the stock'—was but an unfulfilled prediction or erroneous conjecture as to a future event. * * *"

EXCEPTIONS TO THE CHARGE TO THE JURY WERE NOT PROPERLY TAKEN.

The remainder of appellant's brief is devoted to assignment of errors respecting the charge of the court to the jury.

The exception taken to the charge of the court to the jury was as follows:

> "Mr. Butler.—We except to the charge, and particularly to the instruction upon the subject of representations, manner of communication to the plaintiff. Also to the instruction regarding the false representations, and knowledge of falsity on the part of the defendant, and intent to deceive. Also the instruction upon the subject of the belief of the plaintiff of the truth of the representations, and the inducement and the reliance. Also upon the subject of damage. Also to that portion of the charge relative to the absence of certain witnesses, Harris, Wamser, and Holmes, and Fletcher." (Tr. p. 156.)

We submit that exceptions taken in the manner above set forth is not sufficient.

Had the instructions been numbered and the exceptions taken merely by number, the same would have been as adequate, or even more adequate, to apprise the trial court of the particular instruction complained of.

Categorically, the exception might be set out as follows:

Defendant excepts particularly to the following instructions:

The instruction on the subject of representation;

The instruction on the manner of communication to plaintiff;

The instruction regarding false representations;

The instruction regarding knowledge of falsity on the part of defendant;

The instruction regarding intent to deceive;

The instruction upon the subject of belief of the plaintiff of the truth of the representations;

The instruction on the subject of inducement and reliance;

The instruction on the subject of damage;

The instruction relative to the absence of the witnesses Harris, Wamser, and Holmes, and Fletcher.

So far as pointing out anything definite to the court, and thereby giving the court an opportunity to correct the charge if there was any merit to the exception, appellant may as well have stopped with the first clause of the exception, namely, "We except to the charge," and gone no further.

In the following cases, the above manner of saving exceptions is condemned.

Killisnoo Pack. Co. v. Scott, 14 Fed. (2d) 86;
Alaska Steam Co. v. Katzeek, 16 Fed. (2d) 210;
Jones v. United States, 265 Fed. 235.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY AS TO THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE BY DEFENDANT.

It is urged that the court erred in instructing the jury that the representations made by appellant to the effect that the land in question was rich and fertile and highly productive and well adapted to successful commercial orcharding were representations of fact. It is argued that since plaintiff intended to go out and make his own investigation, the statements were therefore only statements of opinion.

There is no evidence in the record tending to show that the appellee ever made any attempt to investigate the property so far as the representations concerning the adaptability of the land to fruit growing, or its quality or fertility, prior to the time of his entering into the contract.

Counsel urges that if it be held that the representations in question be not held to be expressions of opinion as a matter of law, still whether they were statements of material fact or expressions of opinion were matters for the jury to determine.

(a) As hereinabove mentioned, exception was not properly taken to the instruction.

(b) Appellant has not ventured to incorporate in the transcript the representations made in the literature in question. That being the case, it would be impossible for this court to pass upon the question of whether the representations made in the literature were or were not representations of material fact. It must be presumed, therefore, that representations in the pamphlets which the court refers to in the instruc-

tion in question, were such representations as would warrant the giving of the instruction complained of.

Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697 at 702;

Bryant v. Gray, 179 Cal. 679.

(c) There is no merit to the defendant's contention that the representations made were matters of opinion only. That matter has been discussed under the first assignment of error.

(d) In the charge complained of, the court touched on the matter of the materiality of the representations as follows: Speaking of the representations as to the adaptability of the land, the court said,

> "They are in the yellow book, Gentlemen of the Jury, there is no question about that at all; that is no reasonable interpretation of this book other than that it represents that the lands in Rio Linda are well adapted to successful orcharding commercially * * * The representation was there, and he has a right to count upon it * * * But as I said to you, it is in the book, and that is enough for the plaintiff's case, if he read it before he entered into the bargains, and he says he did, and it is for you to say whether or not he did."

The above is the only part of the charge from which it could possibly be understood by the jury that the representations were to be taken by the jury as statements of material fact and not opinion. And what statements does the court refer to? The statements and representations made in the literature; and what those statements were is not before the court here.

As we have hereinabove pointed out, there can be no doubt, under the rules laid down by numerous de-

cisions in this state, that where positive statements are made concerning the quality of the soil in question and its adaptability for a certain purpose, under circumstances here shown to have existed, that such statements are as to material fact, upon which the party to whom they were made has the right to rely, and not mere matters of opinion.

The court, throughout the whole charge to the jury, left it to the jury whether or not the representations alleged were actually made. Now, had the court giving the charge complained of, referred to the oral testimony instead of the printed matter, still the charge would not have been erroneous. In the case of *Scott v. Delta Land etc.,* 57 Cal. App. 320, the allegations as to the representations made were, among others, that the land was of the best quality, fertile in every respect, suitable for the growing thereon of hay, grain and vegetables, and free from noxious weeds and alkali. The trial court found that the representations were made *as alleged.*

In affirming the judgment for the plaintiff, the upper court said,

> "The judgment may be sustained upon evidence supporting any one material misrepresentation * * * *The representations as to the productive quality of the soil* and as to the adequacy of the water supply were material factors which, if they furnished an inducement to the vendees to enter into the contract made by them, would afford ground upon which to base a rescission when their falsity was established. * * * *Misinformation as to the material matters referred to* would constitute representations as to existing facts and conditions, and would not fall within the category of mere opinion or speculation." (Page 324. Italics ours.)

The upper court in reviewing the evidence on the subject of the representation concerning the quality and adaptability of the soil, found the evidence to show that the agent of the company took the plaintiff on the land, took a shovel and showed him the soil at different places and told plaintiff that it was all fine soil and that he had never seen better soil. The agent showed him stands of alfalfa near the land in question and trees and berries on other land near the tract and told him that just such products could be raised on the land in question.

The court went on to say (page 326):

> "* * * As to the representations concerning the character of the soil, it must be conceded that such representations, testified by Scott as having been made, warranted the latter in believing and assuming that the soil was of a character as would produce crops of general kinds suitable to that locality and in acreage quantities."

So we have court holding, as a matter of law, that representations as to the quality and productivity of the soil, made in a manner and under circumstances and conditions very similar to the instant case, were not expressions of opinion only, but representations of material fact, which would ground an action of fraud.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE QUESTION OF THE FALSITY OF THE PRESENTATIONS ALLEGED TO HAVE BEEN MADE BY DEFENDANT.

Concerning the exception taken to this instruction, the appellant failed to sufficiently set forth or designate the portion of the charge concerning which the

exception pertained. This assignment of error appears in the transcript as Assignment of Error No. IV (Tr. p. 31), and the instruction is not set out under that assignment of error. The argument in appellant's brief proceeds under the question of knowledge of falsity of the representations.

A reasonable interpretation of the instruction here complained of does not show that the court took from the jury the question of knowledge of the falsity of the representations on the part of appellant. At the outset the jury is told that if they find that the representations were false, then the next question for them to determine is whether defendant knew the same were false, or whether in reason, defendant ought to have known it, or whether the assertion was made positively, which in the eyes of the law is equivalent to knowledge. Following this, the court touches and comments on the evidence tending to show that the defendant either did or should have known of the truth or falsity of the statements. It is hardly worth while to cite authorities on the right of the trial court to review and make comment on the evidence of the case in giving the instructions. Then the court tells the jury, "* * * Furthermore, it makes this assertion positively, taking the book for it and taking the plaintiff's statements, if you do, as to what the agents told him"* * * As above pointed out, since the representations made in the books or pamphlets are not before the court here, it must be assumed that the representations therein made were positive statements of fact which would ground an action of fraud. Following the above mentioned portion of the charge, the

court said: "* * * When a company or a man asserts positively that a thing is adapted to this or that, is proven to be adapted to this or that, he is bound to have knowledge, and the law will not hear him to deny it. It is to be inferred that if it was false he knew it was false. In legal contemplation, it is the equivalent." From this portion of the charge, appellant picks out the last sentence and sets it out in its argument in a manner indicating that what the court meant by the last sentence was, that if the representations made by the defendant before the court were false, the defendant knew it was false. We submit that the whole of the last portion of the instruction which we have hereinabove quoted must be read together, and that all the court did in that portion of the charge was to instruct the jury generally as to what the law is where a party has made a positive assertion of fact.

We submit that the effect of the rules laid down by sections 1710 and 1572 of the Civil Code of California is as stated by the court in the instruction in question.

If the jury could have gotten the idea from the portion of the instruction which appellant complains of, that the court intended to instruct them that if they found the representations to be false, they need not consider the question of knowledge on the part of the defendant, all doubts must have been dispelled by the instruction which immediately follows, and which appellant cunningly omitted in its argument. The instruction immediately following is as follows (Tr. p. 148): "*If you believe from the greater weight of the evidence* that the defendant knew it was false,

or should have known it, or made a positive assertion, that infers knowledge, and then you proceed to the next step, and that is, did the defendant make this statement with the intent that the plaintiff should believe it * * *."

The remainder of the appellant's argument on the instruction is based on such a strained and absolutely baseless construction of the charge of the court, that we do not deem the same worthy of answer.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE QUESTION OF PLAINTIFF'S RELIANCE ON THE ALLEGED REPRESENTATIONS.

Again in this assignment of error, we wish to remind the court that an exception to this instruction was not taken in the proper manner as hereinabove pointed out.

A portion of the instruction contained on pages 33 and 36 of the transcript under appellant's assignment of error No. VI, is set out in the argument and attacked.

The contention is made that the instruction complained of is argumentative. We submit that an examination of the instruction will disclose that so far as being argumentative is concerned, the instruction merely gives a perfectly fair review of the evidence pertaining to the matter involved in the instruction, which, as above pointed out, is perfectly proper and permissible.

There is no conflict in the evidence to the effect that the respondent knew nothing of California lands nor

the land in question or of the value or its quality, productivity, or adaptability for this or that purpose. The evidence shows without conflict that he came to California for the primary purpose of a vacation and stopped in Sacramento as an incident to his trip, and while here went out to the district in question in company with one of the agents of the appellant on several occasions before going back to Omaha. It shows without conflict that he made no attempt whatever to investigate the quality of the land nor its adaptability to fruit raising, nor its value.

The evidence further shows that he did not know what hardpan is and had no reason to believe or suspect that there existed close to the surface of the soil a thick layer of hardpan, nor did he have any reason to believe that the existence of such hardpan rendered the land unfit for fruit raising. It is not disputed that the only trips respondent made to the district in question and upon the land in question prior to the time of entering into the contract, were made in company with an agent of the appellant. This agent, the evidence shows, took respondent to districts adjacent to the tract in question and showed him what appeared to be thrifty orchards and vineyards, and told him that the land in question was the same as the land of these other districts. According to respondent's testimony, he inquired of the agent why there were not more orchards and vineyards on the tract in question, and the agent told him in effect, that the district was new and that it would take time for the settlers to get their orchards in; that the purpose of the owners was to raise poultry until they could finance

the planting and rearing of orchards. The respondent's testimony further shows that at the time the agent showed respondent the tract which was the subject matter of the first purchase, respondent was told that the tract in question was the best tract appellant had left, and that it was particularly good because it had "drainage." Respondent testified that he believed and relied upon all of the representations made to him. The evidence shows the only circumstance that came to the mind of respondent that created the slightest doubt in his mind, was the fact that there were few orchards growing on the tract, and as above pointed out, the agent gave him a reasonable explanation of that fact. (Tr. pp. 39 to 47 inclusive.)

Now, in the portion of the instruction set out in the argument and concerning which appellant complains, the court did no more than to refer to and comment on the evidence bearing upon respondent's reliance upon the representations in question.

Furthermore, the court left the question of whether respondent did in fact rely upon the representations, to the jury.

It is not contended that the court assumed anything not in evidence nor that the court misstated the facts nor that the court took the question of reliance from the jury, but it is contended in effect that where a party *starts* an investigation after the representations have been made to him, he is thereafter foreclosed from claiming that he relied upon the representations made to him and that therefore the instruction was against law. We know of no case, in this state at least, which

goes that far. The case of *Hacklemand v. Lyman*, 50 Cal. App. 323, cited by appellant under its first assignment of error, which is the only California case cited by appellant bearing directly upon the question, does not go to any such length. The court there states the rule in the following language (page 326):

> "If a purchaser of real estate visits the property prior to the sale and makes a *personal examination of it touching representations* as to its quality, character, or condition, he will be presumed to rely, not upon the representations but upon his own judgment in making the purchase, provided the vendor does nothing to prevent his investigation being full as he chooses." (Italics ours.)

In that case, the plaintiff took an expert out on the land and investigated the very conditions concerning which the representations were made. Whereas, in the instant case, while appellee did visit the land in company with appellant's agent, there is no evidence showing that appellee made any kind of an investigation on his own account *concerning the representations made to him.*

The instant case comes within the rules laid down in the cases which we have hereinabove referred to under other portions of our brief. (*Scott v. Delta Land etc. Co; Powell v. Oak Ridge Co,* supra.) As we have pointed out, those cases present circumstances almost identical with the circumstances here. Under those authorities, it was at least a question for the jury to determine whether appellee did or did not rely upon the representations made to him, and he is not foreclosed from claiming that he did so rely upon

the representations merely because he was on the land prior to the time of the purchase.

Appellant in its argument, makes the following misstatement of facts,—a statement which is entirely unsupported by the evidence: "He" (the appellee) "comes to the community where the land is situated and begins an investigation into the truth or falsity of these statements as to value," * * *; and further the appellant makes the statement that he (the appellee) made the inspection of the land "by himself,"—meaning, we presume, that he made an independent investigation. Following these misstatements of fact, counsel launches into a very unintelligible line of argument, the gist of which seems to be, that it was the legal duty of appellee to have investigated the question of the value of the land; that this he failed to do; that the court said nothing about appellee's investigation of values which was inexcusable on the part of the court; and finally that the court by its charge to the jury, "makes the ignorance of the buyer an excuse for his not having found out the truth about these matters."

We have hereinabove answered the contention that an investigation was made by the appellee as to the truth or falsity of the representation.

As to the contention that it was the duty of appellee to make an investigation, the authorities above cited and analysed answer that. In the case of *Teague v. Hall*, 171 Cal. 668, the court reversed a judgment of the lower court on an instruction held erroneous which in effect told the jury that it is the duty of a

party to investigate the facts where the means of knowledge is open to him, unless he is prevented from so doing by some act on the part of the other party. The court stated that while some of the earlier decisions supported the rule set forth in the instruction there in question, yet the modern tendency is the other way. The court there adopted the rule as stated in *Pomeroy, Equity Jurisprudence,* Sec. 898:

> "Whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent relying on and being misled by it, must be clearly and conclusively established by the evidence. *The mere existence of opportunities* for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact."

In the case of *French v. Freeman,* 191 Cal. 579 at 587, the court said:

> "In other words, the fact that the vendee visited the land is important in determining whether he relied and was entitled to rely upon the statements of the vendor."

THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE QUESTION OF DAMAGES.

The next assignment of error was not properly excepted to for the reason that the court's attention was not called to the portion of the charge complained of.

The complaint alleged that the parties entered into the contracts whereby appellee conveyed to appellant the two parcels of real estate in Omaha at the agreed valuations of $6800.00 and $5800.00 respectively, subject to certain mortgages in the sum of $4136.39 and $3000.00 respectively, and that appellant accepted said conveyances as part payments in the sum of $2663.61 and $2800.00 on account of said contracts. The answer admits that the contract was entered into as alleged and admits that under the terms of the agreement the amounts hereinabove mentioned were allowed as part payment on said purchase price. (Tr. pp. 4, 9, 18, 19.) The contracts were introduced into evidence. (Tr. p. 49.)

Mr. Gibson, appellant's representative from Omaha who acted on behalf of appellant in effecting the exchange, testified on behalf of appellant, but not a word of testimony was elicited from him concerning the value of the properties in Omaha. Appellant did not attempt in any way to show that the property which the appellee conveyed to appellant was actually worth less than the amount allowed for it by the agreement of the parties,—though the agent of appellant, who was a real estate dealer in Omaha, where the property is situated, and therefore competent to testify as

an expert as to the value of the property, was in court and testified on behalf of appellant.

The contract itself, by the terms of which it was agreed by the parties that the Omaha properties should be accepted by appellant as a part payment on the contracts in the amounts above mentioned, is evidence that the amount allowed was the reasonable value thereof.

It is well settled that the agreed value of a thing is at least prima facie evidence of its actual value.

In the case of *Bringham v. Knox,* 127 Cal. 40 at 44, it was held that where the complaint alleged the agreed value, that it was sufficient allegation of the actual value, and that where the defendant had failed to deny the allegation of agreed value, the fact was thereby established without the necessity of proof on the part of the plaintiff, by being admitted by the pleadings.

The case of *Wood v. Niemeyer,* 185 Cal. 526, was an action based on fraud in inducing plaintiff to enter into an exchange of properties. The court held that the memorandum containing a list of the personal property and the agreed value of each item was evidence of the actual value thereof, as bearing on the question of the amount of actual damage plaintiff had suffered.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY IN RELATION TO THE ABSENCE OF HARRIS, WANZER, HOLMES AND FLETCHER, AS WITNESSES.

Here again appellant urges its everlasting criticism of the trial court for reviewing, commenting upon and referring to the evidence in giving the charge to the jury.

As we have pointed out before, it is perfectly permissible for the trial court in giving a charge to the jury to review the evidence, comment upon the same and point out points of weakness or strength with a view to aiding the jury in arriving at a just decision.

In the case of *Vicksburg Ry. Co. v. Putnam,* 118 U. S. 545, the trial court went by far to greater lengths in reviewing the evidence, and expressing opinion on the evidence than did the court in the instant case. In that case the Supreme Court in affirming the judgment had the following to say on the subject:

> "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury."

The trial court, in the instruction here complained of did no more than to comment upon the fact that the owners of the land concerning which Morley testified would be in a better position to testify as to the productivity of the land than was Morley. The Judge

then instructed them that there is a rule of law that where weaker evidence is produced when stronger is available, that fact may be considered in determining the weight to be given the weaker evidence. The court then expressly admonished the jury that it was for them to say what weight was to be given Morley's testimony.

Appellant complains that it was not shown that the owners could be produced. The answer to that is that the process of the court was open to appellant to bring their testimony before the court.

We submit that there is nothing objectionable about the instruction, and that there is no merit to appellant's contention that it was erroneous.

We respectfully submit that the trial was conducted in a fair and impartial manner, and that no reversible error was committed, and that the judgment should therefore be affirmed.

Dated, Sacramento,
June 1, 1929.

Respectfully submitted,

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Attorneys for Appellee.

No. 5708

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGIA CASUALTY COMPANY, a Corporation,

Appellant,

vs.

LAURETT BOYD,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5708

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGIA CASUALTY COMPANY, a Corporation,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

HARRY I. STAFFORD, Esq., DEAN CUNHA, Esq., Flood Building, San Francisco,
Attorneys for Plaintiff.

REDMAN & ALEXANDER, Esqs., 333 Pine Street, San Francisco,
Attorneys for Defendant.

In the United States District Court for the Northern District of California, Southern Division.

No. 18,076.

LAURETT BOYD,

Plaintiff,

vs.

GEORGIA CASUALTY COMPANY, a Corporation,

Defendant.

SECOND AMENDED COMPLAINT ON INDEMNITY INSURANCE POLICY.

Plaintiff complains of defendant and alleges:

1.

That at all times herein mentioned the defendant was and now is a corporation duly organized and existing under the laws of the State of California to engage in the physicians and surgeons indemnity insurance business in the said State of California.

That the principal place of business of the defendant in said State of California was and is in the City and County of San Francisco.

2.

That at all times herein mentioned, and more particularly during the month of November, 1925, one George O. Jarvis was a physician and surgeon licensed to practice medicine and surgery in the State of California under and by virtue of the laws thereof. That previous to said month of November, 1925, the defendant at the City and County of San Francisco, State of California, issued to the said George O. Jarvis a policy of physicians and surgeons indemnity insurance, wherein, plaintiff is informed and believes and upon such information and belief alleges, said defendant agreed upon the payment of a certain specified premium to indemnify the said George O. Jarvis against any liability not exceeding the sum of Five Thousand ($5,000.00) [1*] Dollars with taxed court costs and interest which should arise against the said George O. Jarvis in favor of any person or persons who would sustain any personal bodily injuries by means of the negligence or carelessness of George O. Jarvis in the practice of his aforementioned profession. That plaintiff is informed and believes and upon such information and belief alleges that as conditions precedent to said defendant's assumption of liability under said policy as aforesaid said George O. Jarvis was required to pay said premium as aforesaid; give said defendant

*Page-number appearing at the foot of page of original certified Transcript of Record.

immediate notice of any action brought against said George O. Jarvis for any personal injuries sustained as in said policy provided, and co-operate with said defendant in defending any suit so brought as aforesaid; and said plaintiff is informed and believes and upon said information and belief alleges that said conditions as aforesaid were the only conditions contained in said policy so issued as aforesaid. That the said policy of physicians and surgeons indemnity insurance so issued as aforementioned by the defendant to the said George O. Jarvis was in full force and effect during the month of November, 1925.

3.

That plaintiff is informed and believes and upon such information and belief alleges that the said George O. Jarvis has performed all of the conditions of said policy on his part to be performed.

4.

That in the month of November, 1925, the exact date of which plaintiff is unable to state, the plaintiff consulted George O. Jarvis in his capacity as such physician and surgeon and became a patient of the said George O. Jarvis, and plaintiff paid to said George O. Jarvis a sum of money demanded by him for his services as such physician and surgeon.

5.

That thereafter and in the said month of November, 1925, while the relation of patient and physician and surgeon continued to exist between plaintiff and George O. Jarvis the said George O. Jarvis advised

an [2] operation in the right nasal region of the plaintiff and thereupon the said George O. Jarvis so negligently and carelessly operated upon and treated the said plaintiff as to cause personal bodily injury to the plaintiff; and that therafter the said plaintiff commenced and maintained an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against the said George O. Jarvis for damages for the bodily injuries so sustained by her. That said action was numbered 174,698 in the files of said court and that said action was thereafter tried and judgment was rendered on the 17th day of October, 1927, in favor of the plaintiff and against the said George O. Jarvis in the sum of Five Thousand ($5,000) Dollars, together with taxed costs in the sum of Seventy-six and 50/100 ($76.50) Dollars; that said judgment was docketed in the office of the Clerk of said court on the 19th day of October, 1927, and has become final, and said judgment is now wholly unsatisfied and unpaid.

6.

That on the 16th day of November, 1927, the said George O. Jarvis, upon his voluntary petition filed in the Bankruptcy Court of the Southern Division of the United States District Court for the Northern District of California and numbered 16,537 in the files thereof, was adjudged a bankrupt. That included in the schedules filed by said George O. Jarvis in said proceeding was this judgment held by the plaintiff herein. That previous and again subsequent to said adjudication of bankruptcy plaintiff

demanded of defendant the amount of defendant's liability under and by virtue of the terms of the aforementioned policy of insurance and defendant failed and refused, and still fails and refuses to pay plaintiff the amount of said liability or any part thereof.

7.

That there is now due, owing and unpaid from the defendant to plaintiff the sum of Five Thousand ($5,000.00) Dollars, together with the costs as aforementioned amounting to Seventy-six and 50/100 ($76.50) Dollars, and interest on the sum of Five Thousand Seventy-six and 50/100 ($5,076.50) [3] Dollars, since the 17th day of October, 1927, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of Five Thousand Seventy-six and 50/100 ($5,076.50) Dollars, and interest on said sum from and after the said 17th day of October, 1927, and for such other and further relief as to the Court may seem meet and proper in the premises.

HARRY I. STAFFORD,
Attorney for Plaintiff.

Received a copy of the within amended complaint this 30th day of April, 1928.

REDMAN & ALEXANDER,
Attorney for Defendant.

[Endorsed]: Filed May 2, 1928. [4]

State of California,
City and County of San Francisco,—ss.

Laurett Boyd, being first duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has read the foregoing second amended complaint and knows the contents thereof; that the same is true of her own knowledge except as to the matters which are therein stated on her information or belief, and as to those matters, that she believe it to be true.

Mrs. LAURETT BOYD.

Subscribed and sworn to before me, this 30th day of April, 1928.

[Seal] EDWARD P. McAULIFFE,
Notary Public in and for the County of San Francisco, State of California.

My commission expires Dec. 31, 1930.

[Endorsed]: Filed May 2, 1928. [5]

[Title of Court and Cause.]

ANSWER TO SECOND AMENDED COMPLAINT.

Comes now defendant above named and answering plaintiff's second amended complaint on file herein denies and alleges as follows:

1. Denies the defendant was and/or now is or ever was a corporation duly or at all organized and,

or existing under the laws or any law of the State of California.

2. Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations of said second amended complaint that at all times mentioned in said second amended complaint and more particularly during the month of November, 1925, one George O. Jarvis was a physician and surgeon licensed to practice medicine and surgery in the State of California under and by virtue of the laws thereof and therefore and upon that ground denies each and every of said allegations. Denies that previous to said month of November, 1925, or at any time, the defendant at the City and County of San Francisco, State of California, or any place, issued to said George O. Jarvis a policy of physicians and, or surgeons indemnity insurance, or any policy of insurance, wherein said [6] defendant agreed upon the payment of a certain specified or any premium or at all to indemnify the said George O. Jarvis against any liability not exceeding the sum of $5,000.00, or any sum and, or either taxed court costs and/or interest which should arise against the said George O. Jarvis in favor of any person or persons who would sustain any personal bodily injuries or injury by means of the negligence or carelessness of George O. Jarvis in the practice of his alleged profession, or in favor of any other person or against any liability whatsoever. And denies that as conditions or any condition preceding or at all to the said defendant's assumption of liability under said policy as alleged, said George

O. Jarvis was required to pay the alleged or any premium and, or give immediate or any notice of any action brought against said George O. Jarvis for any personal injuries sustained as in said alleged policy provided and/or co-operate with said defendant in defending any suit so brought as alleged; and denies that said alleged conditions were the only conditions contained in said alleged policy so or at all issued as alleged. And denies that the alleged policy of physicians and/or surgeons indemnity insurance so or at all issued as alleged or otherwise by the defendant to the said George O. Jarvis was in full or any force or effect during the month of November, 1925.

3. Denies that said George O. Jarvis has performed all or any of the conditions of the alleged or any policy issued by defendant on his part to be performed.

4. Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations of paragraphs 4 and 5 of said second amended complaint, and therefore and upon that ground denies each and every allegation in said paragraphs contained. [7]

5. Denies that previous to or again or at all subsequent to the alleged adjudication of bankruptcy of said George O. Jarvis or at any time plaintiff demanded of defendant the amount of defendant's alleged liability under and/or by virtue of the terms of the alleged policy of insurance, and in this behalf denies that there is any liability on the part of defendant under and/or by virtue of the terms or

any term of the alleged or any policy of insurance or at all.

6. Denies that there is now or ever was due and/or owing and/or unpaid from the defendant to plaintiff the sum of $5,000.00 or any sum, together with the alleged costs, amounting to $76.50, or any sum, and/or interest on the sum of $5,076.50, or any interest, since the 17th day of October, 1927, or for any period of time or at all. And denies that the defendant is now or ever was obligated to pay in the amounts alleged or any thereof, or in any sum or amount at all; and denies upon lack of information and belief that no part of said sums has been paid.

7. Further answering said second amended complaint and as a separate defense thereto, said defendant alleges that in a written application executed by said George O. Jarvis for a physician's liability policy he warranted as follows:

> "No claim or suit is pending against me for damages on account of alleged error, mistake or malpractice, and no claim has been paid by me, and no judgment has been entered against me for damages on account of alleged error, or mistake, or malpractice, except as follows: None."

That defendant is informed and believes and therefore alleges that at the time said warranty was made in said application there was pending against said George O. Jarvis a claim for damages on account of alleged error, mistake or malpractice, and that a claim had been paid by said George O. Jarvis

on account of [8] alleged error or mistake or malpractice; that said warranty was made by said George O. Jarvis with full knowledge upon his part that the same was untrue and with intent to mislead defendant and induce defendant to issue the policy of insurance applied for; that said warranty was material to the acceptance of the risk and the issuance of the policy applied for.

8. Further answering said second amended complaint, and as a separate defense thereto, defendant alleges that the policy of insurance issued by defendant to said George O. Jarvis contained a condition that no action should be brought against defendant under or by reason of said policy unless it shall be brought by and in the name of the assured for a loss defined in said policy after final judgment has been rendered in a suit described in said policy and within one year from the date of such judgment.

WHEREFORE, defendant prays to be hence dismissed with its costs.

REDMAN & ALEXANDER,
Attorneys for Defendant. [9]

State of California,
City and County of San Francisco,—ss.

F. M. Ayer, being first duly sworn, deposes and says: That he is claims superintendent of defendant and as such is authorized to verify the foregoing answer to second amended complaint on its behalf; that he has read said answer and knows the contents thereof and that the same is true of his own knowl-

edge except as to the matters therein stated upon information or belief and that as to such matters he believes it to be true.

F. M. AYER.

Subscribed and sworn to before me this 12th day of July, 1928.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within answer admitted this 12th day of July, 1928.

HARRY I. STAFFORD,
Attorney for Plaintiff.

[Endorsed]: Filed July 13, 1928. [10]

[Title of Court and Cause.]

AMENDMENT TO COMPLAINT.

Now comes the plaintiff above named and with leave of Court first had and obtained files this as and for an amendment to her complaint herein.

1.

That during the term of the said policy of insurance issued to said George O. Jarvis and described in the second amended complaint on file herein there was in full force and effect and ever since said time there has been and now is in full force and effect Act No. 3738 of the general laws of the State of California, entitled, "An act re-

lating to actions against an insurance carrier when the insured person is insolvent or bankrupt, or without property sufficient to satisfy execution on account of loss or damage insured against, and requiring policy to be exhibited in certain cases," which Act was at said time in words and figures, as follows, to wit:

"Action Against Insurance Carrier When Insured is Insolvent. Exhibit of Policy.

"Action against insurance carrier when insured is insolvent. Exhibit of policy. No policy of insurance against loss or damage resulting from accident to, or injury suffered by another person and for which the person injured is liable other than a policy of insurance under the workmen's compensation, insurance and safety act of 1917 or any subsequent act on the same subject, or, against loss or damage to property caused by horses or other draught animals or any vehicle, and for which [11] loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any domestic or foreign insurance company, authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action

may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives as the case may be, to recover on said judgment. Upon any proceeding supplementary to execution, the judgment debtor may be required to exhibit any policy carried by him insuring against the loss or damage for which judgment shall have been obtained."

DEERING'S GENERAL LAWS, 1923 Edition, Part One, Page 1371.

HARRY I. STAFFORD,
Attorney for Plaintiff. [12]

State of California,
City and County of San Francisco,—ss.

Laurett Boyd, being first duly sworn, deposes and says that she is the plaintiff in the above-entitled action; that she has read the foregoing amendment to complaint, that the same is true of her own knowledge except as to the matters which are therein stated on her information or belief, and as to those matters, that she believe it to be true.

LAURETT BOYD.

Subscribed and sworn to before me this 18th day of September, 1928.

[Seal] EDWARD P. McAULIFFE,
Notary Public in and for the County of San Francisco, State of California.

[Endorsed]: Filed September 18, 1928. [13]

[Title of Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY.

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant that a trial by jury is hereby waived in the above-entitled action and that the same may be tried by the Court sitting without a jury.

Dated: September 18, 1928.

HARRY I. STAFFORD,
Attorney for Plaintiff.
REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: Filed September 18th, 1928. [14]

[Title of Court and Cause.]

MEMORANDUM OPINION ON ORDERING JUDGMENT FOR PLAINTIFF.

HARRY I. STAFFORD, Esq., for Plaintiff.

Messrs. REDMAN & ALEXANDER, for Defendant.

Plaintiff sues defendant upon a physician's liability policy issued by the defendant to one Dr. George O. Jarvis. Plaintiff made claim against Dr. Jarvis for his alleged malpractice in November, 1925, in treating her, and on September 21, 1926, she commenced an action in the Superior Court of the State of California, in and for the City and

County of San Francisco, against Dr. Jarvis for damages for the alleged malpractice, and thereafter obtained judgment against him in the sum of five thousand dollars, together with costs taxed at $76.-50. Said judgment was docketed in the office of the Clerk of said Superior Court on the 19th day of October, 1927, and has become final. On the 16th day of November, 1927, Dr. Jarvis was, upon his voluntary petition filed in the Bankruptcy Court of this district, adjudged a bankrupt. The evidence shows that the sum of $355.75 has been paid to plaintiff upon said judgment through proceedings in the Bankruptcy Court. [15]

Plaintiff brings this action upon the policy under the provisions of Act 3738, Statutes of California 1919, page 776, which, stated briefly, provides that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injuries sustained or loss occasioned during the life of such policy, etc.

The policy involved was issued for a year and began on the 29th day of May, 1925. The plaintiff was injured in November, 1925. Thereafter, and before action was commenced in the state court, defendant gave notice of rescission to the insured.

It is the contention of the defendant here that it is relieved from liability under the policy because of such attempted rescission based upon an alleged false statement made by the insured on application for the policy.

It appears to the Court that the right of the

plaintiff to sue for damages for injuries sustained had accrued during the life of the policy and before the attempted rescission; such right was therefore not affected by anything that may have occurred thereafter between the insurer and the insured.

It is ordered that plaintiff have judgment for $4,720.75, together with interest on said sum from October 17, 1927, and costs.

October 10, 1928.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Oct. 10, 1928. [16]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,076.

LAURETT BOYD,

Plaintiff,

vs.

GEORGIA CASUALTY COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause came on regularly for trial upon the 18th day of September, 1928, before the Court sitting without a jury, a trial by jury having been waived by written stipulation filed; Dean Cunha

and Dan R. Shoemaker, Esqrs., appearing as attorneys for plaintiff, and William C. Bacon and Harold C. Mundhenk, Esqrs., appearing as attorneys for defendant, and the trial having been proceeded with and oral and documentary evidence upon behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation having rendered its decision and filed its memorandum opinion, and ordered that judgment be entered herein in accordance with said opinion in favor of plaintiff for the sum of $4,720.75, together with interest thereon at the rate of seven per cent (7%) per annum from October 17th, 1927, and for costs.

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Laurett Boyd, plaintiff, do have and recover of and from Georgia Casualty Company, a corporation, defendant, the sum of Five Thousand Forty-four and Seventy-seven/100ths ($5,044.77) Dollars, together with her costs herein expended taxed at $32.00.

Judgment entered October 10th, 1928.

WALTER B. MALING,
Clerk. [17]

[Title of Court and Cause.]

STIPULATION THAT PLAINTIFF'S EXHIBIT No. 2 NEED NOT BE SET OUT IN FULL IN BILL OF EXCEPTIONS OR TRANSCRIPT ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that Plaintiff's Exhibit No. 2 (the judgment-roll in the case of "Laurett Boyd vs. George O. Jarvis" in the Superior Court in and for the City and County of San Francisco, State of California, and numbered therein No. 174,698) need not be set out in full in defendant's bill of exceptions or in the transcript on appeal in the above-entitled action, but that the contents and substance of the same may be set out in lieu thereof, no exception or error being assigned to the introduction in evidence of said judgment-roll.

It is further stipulated that Plaintiff's Exhibit No. 2 (said judgment-roll) may be secured for and submitted to the Circuit Court of Appeals if said Court requests for examination in connection with its consideration of this case on appeal.

Dated: San Francisco, December 5, 1928.

HARRY I. STAFFORD,
Attorney for Plaintiff.
REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: Filed December 8, 1928. [18]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above-entitled cause came on for trial before the above-entitled Court, Hon. A. F. St. Sure presiding, on Tuesday, the 18th day of September, 1928, without a jury, the jury having been duly waived in the manner required by law by written stipulation filed in said action in the office of the Clerk of said court, Messrs. Harry I. Stafford and Dean Cunha appearing as attorneys for plaintiff, and Messrs. Redman & Alexander and W. C. Bacon appearing as attorneys for defendant. Thereupon the following proceedings were had:

Counsel for plaintiff made a brief opening statement and thereafter proceeded with the testimony.

TESTIMONY OF CHARLES BURKE, FOR PLAINTIFF.

CHARLES BURKE was called as a witness for the plaintiff and, being duly sworn, testified as follows:

I am an employee of the County Clerk's office in the City and County of San Francisco, State of California. I am [19] here in response to a subpoena served upon my office and have been delegated to attend court here to-day and bring these papers with me. I have the original papers from

(Testimony of Charles Burke.)

the County Clerk's office in the case entitled "Laurett Boyd vs. George O. Jarvis" and numbered 174,698.

TESTIMONY OF GEORGE O. JARVIS, FOR PLAINTIFF.

GEORGE O. JARVIS, a witness on behalf of the plaintiff, was called and, being duly sworn, testified as follows:

My name is George O. Jarvis. I am a physician and surgeon duly licensed to practice in the State of California and I was such in the month of November, 1925. I am the same George O. Jarvis who was sued in the action entitled "Laurett Boyd vs. George O. Jarvis," in the Superior Court in and for the City and County of San Francisco, State of California, and numbered 174,698.

I am here in response to a subpoena and have brought with me the policy of insurance referred to in the subpoena. I made application to the Georgia Casualty Company for a policy with them and they issued a policy to me; this is a renewal of the policy first issued upon my application.

Thereupon the policy was offered in evidence and in that connection the following proceedings were had:

"Mr. CUNHA.—We now offer in evidence, if your Honor please, policy No. PH. 33967, Georgia Casualty Company, Physician's Liability Policy, wherein the assured is George O. Jarvis. The term

of the policy is twelve months, commencing on the 29th of May, 1925, and ending on the 29th of May, 1926. It stipulates for a premium of $25. The Company's liability for damages on [20] account of injury or death of one person is $5,000.00. The total liability is $15,000. The policy insures the assured against loss for liability imposed by law on the assured for damages on account of bodily injury or death suffered by any person or persons in consequence of any alleged error, or mistake, or malpractice occurring in the practice of the assured's profession, as prescribed by the schedule endorsed thereon.

We offer this in evidence and ask that it be marked Plaintiff's Exhibit 1.

Mr. BACON.—If the Court please, we object to the introduction of this document in evidence, upon the ground that it is immaterial, irrelevant, and incompetent; upon the further ground that it does not appear to be the document which is pleaded in the complaint, and that there is a variance between the exhibit now offered and the document referred to in the complaint.

The COURT.—Point that out to the Court. You are just making a general objection. Point out that variance to the Court.

Mr. BACON.—Our contention is that in this case the plaintiff is seeking to recover upon a policy of insurance issued to another party, and that there is no allegation anywhere in the complaint which alleges that other persons are entitled to maintain

this action. The point was raised on demurrer, but perhaps at that time it was not the proper time to assert it before the Court. We contend that if they attempt to take advantage of a statute of the State of California, which I assume they are doing, they should have so pleaded it in their complaint.

The COURT.—Do you think there is anything in the point here made by counsel?

Mr. CUNHA.—No, I do not, your Honor. It was urged [21] before.

The COURT.—Do you want to amend and make the provisions of the statute a part of your complaint?

Mr. CUNHA.—Yes, we will ask to do that.

The COURT.—Very well, you may amend your complaint. During the recess you may prepare a written amendment.

Mr. BACON.—May we enter an objection and an exception to their being permitted to amend the complaint at this time, your Honor?

The COURT.—Yes. Objection overruled. The policy may be admitted in evidence.

Mr. BACON.—Exception."

Thereupon the document was admitted in evidence and marked Plaintiff's Exhibit No. 1.

Plaintiff's Exhibit No. 1 is as follows: [22]

LIABILITY DEPARTMENT

PHYSICIANS' LIABILITY POLICY (Including Dolosse)

No. PH-33967

Georgia Casualty Company

Macon, Ga.

(HEREIN CALLED THE COMPANY)

A STOCK COMPANY

In Consideration of TWENTY FIVE AND NO/100 Dollars ($ 25.00) *Premium, and the Statements contained in the Schedule endorsed hereon and made a part hereof, which Statements the Assured makes and represents to be true by the acceptance of this Policy,*

Does Hereby Agree to Indemnify

GEO. O. JARVIS

of SAN FRANCISCO County of SAN FRANCISCO State of CALIFORNIA hereinafter called the Assured, for the term of TWELVE (12) months, beginning on the TWENTIETH NINTH day of MAY, 192[5], at noon and ending on the TWENTIETH NINTH day of MAY, 192[6], at noon, Standard Time, at the place where this Policy has been countersigned, AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries or death suffered by any person or persons in consequance of any alleged error or mistake or malpractice occurring in the practice of the Assured's profession as described in the Schedule endorsed hereon, and against loss from the liability imposed by law upon the Assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any alleged error or mistake or malpractice by any assistant in the employ of the Assured while acting under the Assured's instructions and occurring while this Policy is to force, and the Company will defend, at its own cost, in addition to the limits named in Condition A, in the name and on behalf of the Assured, any civil suit or suits, whether groundless or not, for the recovery of damages for such alleged error or mistake or malpractice, subject to the following conditions:

CONDITION A: The Company's liability for such damages on account of injury to or the death of one person is limited to Five Thousand Dollars ($5,000.00) and, subject to the same limit for each person, the Company's total liability for such damages on account of such injuries to or in the death of any number of persons is limited to Fifteen Thousand Dollars ($15,000.00).

CONDITION B: The Company shall not be liable under this Policy for any claim, against the Assured or any assistant arising from the violation of any law or ordinance on the part of the Assured or any assistant; nor shall the Company be liable if at the time of the alleged error or mistake or malpractice, the Assured or any assistant was more or less under the influence of anaesthetics, intoxicants or narcotics.

CONDITION C: The Assured shall as soon as practicable give written notice of any charge of error or mistake or malpractice, and of any claim for damages covered by this Policy, with the fullest information obtainable at the time, to the Home Office of the Company at Macon, Georgia, or to the Company's authorized agent.

CONDITION D: If thereafter any suit is brought against the Assured to enforce a claim whether groundless or not for damages on account of any claim covered by this Policy, the Assured shall immediately forward to the Company's Home Office every summons or other process as soon as the same shall have been served on him, and the Company will at its own cost defend such suit in the name and on behalf of the Assured, or, only with the Assured's written consent, the Company may compromise any claim at its own cost.

CONDITION E: The Assured shall not, without the written consent of the Company previously given, incur any expense or settle any claim, except at his own cost, nor interfere in any negotiation for settlement after having consented to a compromise, nor interfere in any legal proceeding without the written consent of the Company previously given. If the Assured so desire he may, together with the Company's representative, make a selection of a local attorney, who, together with the Company's Attorney, will defend the case without expense to the Assured.

CONDITION F: Whenever requested by the Company, the Assured shall aid in securing information and evidence and the attendance of witnesses and in prosecuting appeals.

CONDITION G: If the Assured carries other insurance against a casualty covered by this Policy the Assured shall not be entitled to recover a larger proportion of the loss than the sum hereby insured bears to the whole amount of valid and collectible insurance, and if any of such other insurance shall be that of the Company, the Assured must elect under which policy of the Company all claims arising out of such casualty shall be treated, and thereafter the Company shall not be liable to the Assured in connection with such casualty under any other policy.

CONDITION H: No action shall be brought against the Company under or by reason of this Policy unless it shall be brought by and in the name of the Assured for a loss, defined hereunder, after final judgment has been rendered in a suit, described hereunder, and within one year from the date of such judgment, to-wit: for loss that the Assured has actually sustained by the Assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the Assured for damages; (b) of the expense (excluding any payment in settlement of a suit or judgment) incurred by the Assured in the defense of a suit against the Assured for damages. The Company does not prejudice by this condition any defense against such action that it may be entitled to make under this Policy.

CONDITION I: No assignment of interest under this policy shall bind the Company.

CONDITION J: In case of payment of loss under this Policy, the Company shall be subrogated to all claims or rights of the Assured, as respects such loss, against any person or persons, and the Assured shall execute any and all papers required and shall co-operate with the Company to secure said rights, without prejudice to the rights of the Assured as respects any alleged error or mistake or malpractice theretofore occurring.

CONDITION K: This Policy may be cancelled at any time by the Assured by notice to the Company. It may be cancelled by the Company at any time by giving not less than five days' written notice, sent by registered mail to the Assured, at his address given in the schedule. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata. If cancelled by the Assured, the Company shall be entitled to the earned premium computed by the short rate table printed thereon. The check of the Company sent by registered mail to the said address of the Assured shall be sufficient tender of any unearned premium due the Assured.

CONDITION L: No erasure or change appearing on the face of this Policy as originally printed and no change or waiver of any of its terms or conditions or statements shall be valid unless endorsed hereon by the President, one of the Vice-Presidents or the Secretary of the Company. Notice to or knowledge by any agent or any other person shall not be held to waive any of the terms, conditions or statements hereof.

CONDITION M: No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by the President, one of the Vice-Presidents or the Secretary of the Company.

In Witness Whereof, the GEORGIA CASUALTY COMPANY has caused this Policy to be signed by its President and Secretary at Macon, Georgia, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative of the Company.

E. P. Amerine — Secretary

W. B. Turnley — President

Countersigned at SAN FRANCISCO, CALIFORNIA this 17th day of APRIL, 19 25

Agent.

Endorsement

E-1

EFFECTIVE AT HOUR DATE OF POLICY ISSUED

IN CONSIDERATION OF THE PREMIUM CHARGED IT IS HEREBY UNDERSTOOD AND AGREED THAT CONDITION A OF THE INDEMNIFYING AGREEMENTS IS AMENDED TO READ:

"THE COMPANY'S LIABILITY FOR SUCH DAMAGES ON ACCOUNT OF INJURY TO OR THE DEATH OF ONE PERSON IS LIMITED TO FIVE THOUSAND AND NO/100 ($5,000.00) AND, SUBJECT TO THE SAME LIMIT FOR EACH PERSON THE COMPANY'S TOTAL LIABILITY FOR SUCH DAMAGES ON ACCOUNT OF SUCH INJURIES TO OR IN THE DEATH OF ANY NUMBER OF PERSONS IS LIMITED TO TWENTY THOUSAND AND NO/100 ($20,000.00)

Nothing herein contained shall vary, alter or extend any provision of the policy, other than as above stated.

Attached to and forming part of Policy No FH-83967 issued by the GEORGIA CASUALTY COMPANY, of Atlanta, Georgia, to GEO. O. JARVIS

In Witness Whereof, the GEORGIA CASUALTY COMPANY, of Atlanta, Georgia, has caused these presents to be signed by its President and Vice-President.

Vice President

President

Countersigned and dated at SAN FRANCISCO this 17th day of APRIL 192 26

(Form E 1) 3M 3 25 6828

General Agent

Right of Recovery

E-16

IT IS UNDERSTOOD AND AGREED, notwithstanding anything contained in this policy to the contrary, that the insolvency or bankruptcy of the Assured hereunder shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of this Policy and in case judgment shall be secured against said Assured by the injured person or his heirs or personal representatives in case death resulted from the accident, an action may be brought by said injured person or his heirs or personal representatives in case the accident caused his death, to recover on the Policy the amount of such judgment, not exceeding the amount of this Policy, and subject to all its other terms and limitations.

Nothing herein contained shall vary, alter or extend any provision of this Policy, other than above stated

Attached to and forming part of Policy No. FH-83967 issued by the GEORGIA CASUALTY COMPANY, of Atlanta, Georgia, to GEO. O. JARVIS

In Witness Whereof, the GEORGIA CASUALTY COMPANY, of Atlanta, Georgia, has caused these presents to be signed by its President and Secretary

Secretary

President

Countersigned and dated at S.F., CALIF. this 17th day of APRIL 19 26

General Agent

Ind. Form 181 (Rev 12 24 1925)

SCHEDULE OF STATEMENTS

This Policy is based upon the following statements which are represented by the Assured to be true and correct, and in consideration of which the Policy is issued:

(1) My full name is GEO. O. JARVIS

(2) My age is 65 years.

(3) My office is 240 STOCKTON ST., (STREET AND NUMBER) City SAN FRANCISCO, CAL. State CALIFORNIA.

(4) I am not interested in any other office, except as follows: NO EXCEPTIONS

(5) My residence is STEVART HOTEL, GEARY AND POWELL STS. (STREET AND NUMBER) City SAN FRANCISCO, CALIFORNIA. State CALIFORNIA.

(6) I am duly qualified PHYSICIAN AND SURGEON, graduated in the year 1898 from UNIVERSITY OF PENNSYLVANIA College of UNIVERSITY OF PENN. MEDICAL SCHOOL

(7) Since graduation I have practiced my profession in the following places only: PHILADELPHIA, PENNSYLVANIA - ASHLAND, OREGON AND SAN FRANCISCO, CALIFORNIA.

(8) I have no defense or indemnity or liability insurance and have no application for such insurance pending, except as follows: NO EXCEPTIONS - NONE

(9) I am a member in good standing of the following medical associations and societies: OREGON STATE AND AMERICAN MEDICAL

(10) No claim or suit is pending against me for damages on account of alleged error or mistake or malpractice and no claim has been paid by me and no judgment has been entered against me for damages on account of alleged error or mistake or malpractice, except as follows: NO EXCEPTIONS

(11) I am not in the employ of any person or firm or corporation and I am not connected with any hospital or clinic or other institution, except as follows: NO EXCEPTIONS

(12) I have no partner or partners, except as follows: NO EXCEPTIONS

(13) I have no assistant or assistants, except as follows: NO EXCEPTIONS

(14) I am in good health and in full possession of all senses and free from any intemperate habit, except as follows: NO EXCEPTIONS

(15) I do not advertise in the public prints.

(16) I agree that the Company shall not be bound by statements made to or knowledge acquired by agents or brokers not written hereon.

2534

Physician's Liability Policy

No. PH 33967

Georgia Casualty Company

Macon, Ga.

ASSURED

GEO. O. JARVIS

Premium - - $ 25.00

Expires MAY 29th, 1926

Please Read Your Policy

OLDS AND STOLL
GENERAL INSURANCE BROKERS
1040 GEARY STREET - SAN FRANCISCO CAL.
PHONE PROSPECT 7700

Wm. Mack, Ch. Ins. Pool

No. 18076

Boyd Georgia Casualty Co

Pltf's Exhibit No. 1.

Sept. 18, 1928

By J. A. Schwartz

Thereafter the judgment-roll in the case of "Laurett Boyd vs. George O. Jarvis" in the Superior Court of the City and County of San Francisco, State of California, numbered 174,698 was filed and received in evidence and marked, Plaintiff's Exhibit No. 2.

By stipulation Plaintiff's Exhibit No. 2 is not set out in full herein for the reason that it would serve no useful purpose and no exception is taken to the introduction of it in evidence. In substance Plaintiff's Exhibit No. 2 is as follows:

PLAINTIFF'S EXHIBIT No. 2.

The judgment-roll contains (1) plaintiff's complaint for damages for malpractice, (2) defendant's answer to the complaint, (3) the verdict of the jury, (4) the judgment on the verdict, and (5) the certificate of the County Clerk of the City and County of San Francisco to the judgment-roll.

The verified complaint was filed in the office of the County Clerk of the City and County of San Francisco on September 21, 1926. The complaint alleges that defendant George O. Jarvis is a physician and surgeon duly licensed to practice in California and practicing in San Francisco; that in October, 1925, plaintiff consulted defendant as such physician and surgeon and became his patient paying for his services; that in November, 1925, defendant advised and performed an operation in the left nasal region of plaintiff's head; that in said operation defendant negligently, carelessly and with knowledge permitted a small part of a metal

instrument used in the operation to remain in said portion of plaintiff's head; that as a result of such negligence plaintiff suffered great pain and anguish and will be compelled to undergo an operation to remove said metal part; [25] that plaintiff expended the reasonable sum of $250.00 for services of a surgeon who made an unsuccessful attempt to remove the metal from her head; that by reason of defendant's negligence plaintiff was damaged in the sum of $25,250.00 and prayed for damages in said amount.

The verified answer of defendant to the complaint was filed in the office of the County Clerk of the City and County of San Francisco on November 19, 1926. The answer denies any and all negligence on defendant's part in connection with the operation or in connection with his services and treatment of plaintiff; denies that plaintiff was damaged in the sum of $25,250.00 or in any sum; and alleges contributory negligence of the plaintiff in failing, neglecting and refusing to follow defendant's instructions and treatment.

The verdict of the jury is dated and was filed in open court by the Clerk of the Superior Court of the City and County of San Francisco on October 17, 1927, and is as follows:

"We, the jury in the above-entitled cause, find a verdict in favor of the plaintiff Laurett Boyd and against the defendant George O. Jarvis for the sum of Five Thousand Dollars.

Signed—JAS. W. HARRIS,
Foreman."

(Testimony of George O. Jarvis.)

The judgment on the verdict was entered on October 18, 1927, in Book 212 of Judgments at page 398 in favor of plaintiff Laurett Boyd and against defendant George O. Jarvis in the sum of $5,000, with interest at 7% from the date thereof with costs amounting to $76.50.

The certificate of the County Clerk of the City and County of San Francisco, State of California, and *ex-officio* Clerk of the Superior Court is dated October 19, 1927, and certifies [26] to the correctness of the judgment entered and recorded and that the papers annexed constituted the judgment-roll in said cause.

Thereupon the testimony of GEORGE O. JARVIS for plaintiff continued as follows:

I paid the premium on this policy of insurance to the representative of the Georgia Casualty Company. When I was sued by Mrs. Boyd I turned the complaint and summons in the case over to the Georgia Casualty Company to defend me and offered to assist it in the defense of the suit.

"Mr. CUNHA.—Q. I will ask you did you perform all the conditions on your part in this policy to be performed?

A. Yes.

Mr. BACON.—Just a moment. I object to that as calling for the conclusion of the witness.

The COURT.—Objection overruled.

Mr. BACON.—Exception. I will ask that the answer be stricken on the ground that the question calls for a conclusion of the witness.

(Testimony of George O. Jarvis.)

The COURT.—Objection overruled.

Mr. BACON.—Exception.

The COURT.—The witness answered the question ahead of the objection, but the objection will stand as entered before the question was answered."

The testimony of GEORGE O. JARVIS for the plaintiff then continued as follows:

On November 16, 1927, I filed a voluntary petition in bankruptcy in the Southern Division of the United States District Court for the Northern District of California and on that [27] day was declared a bankrupt. I have not paid any money to Mrs. Boyd on account of the judgment which she secured against me except whatever moneys have been paid her through the Bankruptcy Court.

"The COURT.—How much has been paid through the Bankruptcy Court?

Mr. CUNHA.—$355.75. That is all."

Cross-examination.

Upon cross-examination the witness GEORGE O. JARVIS testified as follows:

I am also here pursuant to a subpoena served upon me by the defendant and I have brought with me whatever documents I have which are referred to in the subpoena. I brought the policy which was all I had. I did not have the letters or notices of rescission of the policy addressed to me by the Georgia Casualty Company under date of August 26, 1926. I had received the letters and I think the attorney took them. At any rate they could not be

(Testimony of George O. Jarvis.)

found. I did receive the letters dated August 26, 1926 from the Georgia Casualty Company referred to in the subpoena.

These copies of letters which you now show me are copies of the letters that I received.

Thereupon defendant offered the documents in evidence and the following proceedings were had:

"Mr. BACON.—We offer in evidence at this time two letters, both dated August 26th, addressed to Dr. George O. Jarvis, the witness on the stand, by the Georgia Casualty Company, signed by its resident manager, George F. Kyle, reading [28] as follows:

Mr. CUNHA.—We object to the offer on the ground that it is not proper cross-examination. Further, upon the ground that no foundation has been laid for the introduction of the copies. And upon the further ground that they are self-serving, and not binding upon the plaintiff in this case.

The COURT.—As to the objection that they are not proper cross-examination, I presume you are making the doctor your own witness as to that, are you?

Mr. BACON.—I can hold this until the defendant's case, and prove the rescission at that time. That may be the better order to adopt.

The COURT.—Very well, let that be the order."

The testimony of GEORGE O. JARVIS upon cross-examination then continued as follows:

Upon direct examination I testified that the papers served upon me in the case of Boyd vs.

(Testimony of George O. Jarvis.)

Jarvis were turned over to the Georgia Casualty Company with the request that they defend me in the suit. Either I or my attorney did this but I cannot state that I personally at any time tendered the defense of the case to the Georgia Casualty Company.

The notices of rescission which were shown to me a moment ago were not received by me prior to the commencement of the suit by Mrs. Boyd against me. The suit is what brought the notices from the Georgia Casualty Company. My recollection is that there was nothing said by the Georgia Casualty Company to me until after suit had been instituted. I don't know what the legal definition of the commencement of a suit is and, although the letters or notices of rescission are dated August 26, 1926, [29] and the complaint in Mrs. Boyd's suit against me appears to have been filed on September 21, 1926, the fact that she either sued or was about to sue was what brought the letters from the Georgia Casualty Company. I think the letters were probably received about the date which the letters bear, August 26, 1926. In connection with the letters I also received back the amounts mentioned in the letters as premiums which I paid for the policies. I turned that money back to my attorney, Harry Godsell (Gottesfeld), along with the letters for him to give to the Georgia Casualty Company.

TESTIMONY OF LAURETT BOYD, FOR PLAINTIFF.

LAURETT BOYD was then called as a witness for the plaintiff and, being duly sworn, testified as follows:

I am the plaintiff in the action entitled "Laurett Boyd vs. George O. Jarvis," in the Superior Court in and for the City and County of San Francisco State of California, and numbered 174,698, in the records of that court. In that action I recovered a judgment in the sum of $5,000.00 principal, and $76.50 costs, and I have received no money on account of that judgment except the sum of $355.75, which was paid to me by the bankrupt estate of George O. Jarvis.

"Mr. CUNHA.—At this time we will offer in evidence Section 3738 of the Statutes of the State of California, found in the 1923 edition, General Laws of California, at page 1371, part 1 thereof. We ask that the same be considered as having been read in evidence.

Plaintiff rests." [30]

Thereafter defendant's counsel moved for a nonsuit upon the grounds that the allegations of the complaint had not been proven by the plaintiff in that it had not been shown that all of the conditions of the policy of insurance required to be performed by Dr. Jarvis had been performed and that the policy offered in evidence is at variance with the

(Testimony of George O. Jarvis.)

allegations of plaintiff's second amended complaint. The motion was denied by the Court and an exception was taken by the defendant.

TESTIMONY OF GEORGE O. JARVIS, FOR DEFENDANT (RECALLED).

GEORGE O. JARVIS was recalled as a witness for the defendant and testified as follows:

I identify the documents which are now shown me as copies of letters which were received by me at approximately the dates appearing thereon. The subpoena directed me to bring the originals but I did not have them and could not do it.

Thereupon defendant offered the letters in evidence and in that connection the following proceedings were had:

"Mr. BACON.—We offer these letters in evidence.

Mr. CUNHA.—Objected to on the ground that no proper foundation has been laid for introduction of copies; furthermore, the letters are self-serving, and not binding on the plaintiff.

The COURT.—The letters may be self-serving, but I think the proper foundation is laid. The doctor said he received the letters, and turned them over to somebody, and, so far as he is concerned, they are lost, and cannot be found, and that he remembers he received the originals. It may be that the letters are subject to your objection that they are self-serving. [31]

Mr. BACON.—At this time I will read the let-

ters, which are notices of rescission. It is on the stationery of the Georgia Casualty Company, Atlanta, Georgia, August 26, 1926.

'George O. Jarvis,
240 Stockton Street,
San Francisco, California.

Policy No. PH–33967.

Dear Sir: Referring to above indicated policy issued to you by Georgia Casualty Company, we beg to state that we have just discovered that your statement 10 in the schedule of the policy is false; accordingly, the company rescinds the policy, and returns to you the premium of $25 enclosed herewith.'

The other letter is substantially the same, and refers to another policy.

The COURT.—That statement referred to is set up in your answer to the complaint, in paragraph VII, I presume?

Mr. BACON.—Yes, your Honor. I do not recall the paragraph, but it is set up in the answer. Yes, it is in paragraph VII. I offer these letters in evidence.

Mr. CUNHA.—We make the same objection.

The COURT.—There is no proof here before me that there was any suit pending against the doctor for damages at the time he made the application for the policy.

Mr. BACON.—I am going to offer proof, your Honor.

The COURT.—Objection overruled.

Mr. CUNHA.—Exception.

The COURT.—You may hereafter move to strike unless that proof is supplied."

Thereupon the documents were received in evidence and marked Defendant's Exhibit "A." Defendants' Exhibit "A" is as follows: [32]

Georgia Casualty Company

Atlanta, Georgia

August 26, 1926.

Dr. George O. Jarvis,
240 Stockton St.,
San Francisco, Calif.

Dear Sir: Policy No. PH-53967

Referring to the above indicated policy issued to you by the Georgia Casualty Company, we beg to state that we have just discovered that your Statement No. (16) in the schedule of the policy is false. Accordingly the company rescinds the policy and returns to you the premium of $25.00 enclosed herewith.

Yours truly,

GEORGIA CASUALTY COMPANY

By: [signature]
Resident Manager

United States District Court

No. 18076

Boyd vs. Georgia Casualty Co.

Deft's Exhibit No. A

Filed Sept. 18, 1928

WALTER B. MALING, Clerk

[signature] Deputy Clerk.

Georgia Casualty Company

Atlanta, Georgia

August 26, 1926.

Mr. George O. Jarvis.
240 Stockton St.,
San Francisco, Calif.

Dear Sir: Policy No. FR-6286

Referring to the above indicated policy issued to you by the Georgia Casualty Company, we beg to state that we have just discovered that your Statement Nine (9) in the schedule of the policy is false. Accordingly the company rescinds the policy and returns to you the premium of $20.00 enclosed herewith.

Yours truly,

GEORGIA CASUALTY COMPANY

By: _____
Resident Manager

(Testimony of George O. Jarvis.)

THEREAFTER the testimony of GEORGE O. JARVIS, recalled by defendant, continued as follows:

The document which is now shown to me bears my signature and is filled out in my own handwriting in so far as the written portion is concerned, and all of the statements therein were made by me at the time I applied to defendant for the policy and all of the statements therein were made by me of insurance. The document is dated May 29, 1925.

Thereupon the document referred to was offered in evidence and in that behalf the following proceedings were had:

"Mr. BACON.—At this time we offer in evidence the application for the policy of insurance before the Court, and ask that the same be considered read in evidence. If no objection is made, I will read the portion to which I refer briefly.

The COURT.—It may be admitted. You may read it.

Mr. BACON.—This document is a form used by the Georgia Casualty Company in applying for policies of insurance. Without reading the entire portion, it is the application admitted by the witness to have been signed by him. It states his name, age, and information relative to his practice as a physician. Paragraph 10 is the one to which particular reference is made:

> 'No claim or suit is pending against me for damages on account of alleged error, mistake,

or malpractice, and no claim has been paid by me and no judgment has been entered against me for damages on account of alleged error, or mistake, or malpractice, except as follows: None.'

The statement at the head of the application is:

'This policy is based upon the following statements of fact which are warranted by the assured to be true and correct, and in consideration of which the policy is issued.' [36]

The document is offered in evidence by the defendant.

Mr. CUNHA.—We object at this time, on the ground that no showing has been made that that is actually a part of the policy.

The COURT.—Objection overruled.

Mr. BACON.—The answer to that is that it appears from the exhibit, itself, that the matters are made a part of the policy."

Thereupon the document was received in evidence and marked Defendant's Exhibit "B."

Defendant's Exhibit "B" is as follows:

DEFENDANT'S EXHIBIT "B."

PHYSICIAN'S LIABILITY APPLICATION

LIABILITY DEPARTMENT

Georgia Casualty Company

Macon, Georgia

(Form OR 14) 5m 6-23 8492

H. O. No.	THESE BLANKS FOR HOME OFFICE USE ONLY							POLICY No.
	Policy Written	Policy Checked	Ledger	Premium ovrs	Com.	Class	Div.	P H
RENEWAL OF P H	ENDORSEMENTS							RATE APPROVED

GENERAL AGENT

Date of Policy 11-6-24 Period 12 Months Terminating

Limits: One Person, $ 5000. One Accident, $ 20000.

Estimated Premium, $ 25.00

This Policy is based upon the following statement of facts, which are warranted by the Assured to be true and correct, and in consideration of which the Policy is issued:

1. My full name is Geo O Jarvis.
2. My age is 52 years.
3. My office is 240 Stockton (Street and Number) City San Francisco State California
4. I am not interested in any other office, except as follows: none
5. My residence is Stewart Hotel (Street and Number) Geary & Powell Sts City San Francisco State
6. I am duly qualified Physician & Surgeon graduated in the year 1898 from Univ. of Penna College of Univ. of Penna Medical Sch
7. Since graduation I have practiced my profession in the following places only: Philadelphia - Penna. Oakland, Oregon San Francisco, Calif.
8. I have no defense or indemnity or liability insurance and have no application for such insurance pending, except as follows: none.
9. I am a member in good standing in the following medical associations and societies: Oregon State - Alameda Med.
10. No claim or suit is pending against me for damages on account of alleged error, mistake or malpractice, and no claim has been paid by me, and no judgment has been entered against me for damages on account of alleged error, or mistake, or malpractice, except as follows: none
11. I am not in the employ of any person, or firm, or corporation, and I am not connected with any hospital or clinic or other institution, except as follows: none
12. I have no partner or partners, except as follows: none.
13. I have no assistant or assistants, except as follows: none
14. I am in good health and in full possession of all senses and free from any intemperate habit, except as follows: no exceptions
15. I do not advertise in the public prints. no
16. I agree that the Company shall not be bound by statements made to or knowledge acquired by agents or brokers not written hereon.

Geo. O. Jarvis, M.D.

Agents.

BROKERAGE

[Note] Agent must state below name of Broker or Sub-Agent interested in the risk, and rate of brokerage to be paid

Broker or Sub-Agent W. H. Brierley 1040 Geary St. S.F. Brokerage 15% per cent.

Endorsement

E-1

EFFECTIVE WITH EVEN DATE OF POLICY SPECIFIED

IN CONSIDERATION OF THE PREMIUM CHARGED IT IS HEREBY UNDERSTOOD AND AGREED THAT CONDITION A OF THE INDEMNIFYING AGREEMENTS IS AMENDED TO READ:

"THE COMPANY'S LIABILITY FOR SUCH DAMAGES ON ACCOUNT OF INJURY TO OR THE THE DEATH OF ONE PERSON IS LIMITED TO FIVE THOUSAND AND NO/100 ($5,000.00) AND, SUBJECT TO THE SAME LIMIT FOR EACH PERSON, THE COMPANY'S TOTAL LIABILITY FOR SUCH DAMAGES ON ACCOUNT OF SUCH INJURIES TO OR IN THE DEATH OF ANY NUMBER OF PERSONS IS LIMITED TO TWENTY THOUSAND AND NO/100 ($20,000.00)

Nothing herein contained shall vary, alter or extend any provision of this Policy, other than above stated.

Attached to and forming part of Policy No. PH-33967 issued by the GEORGIA CASUALTY COMPANY, of Atlanta, Georgia, to GEO. O. JARVIS

In Witness Whereof, the GEORGIA CASUALTY COMPANY, of Atlanta, Georgia, has caused these presents to be signed by its President and Vice-President.

E. P. Amerine
Vice-President

W. S. Tomasy
President

Countersigned and dated at SAN FRANCISCO this 17th day of APRIL 19 25

General Agent

(Form E-1) 20M 2-25-1928

PHYSICIAN'S LIABILITY APPLICATION

(37)

LIABILITY DEPARTMENT

Georgia Casualty Company

Macon, Georgia

Form DG 141 5m 6-23 4492

H. O. No.	THESE BLANKS FOR HOME OFFICE USE ONLY						POLICY No
	Policy Written	Policy Checked	Ledger	Premium ovars	Com.	Class	Div.	PH -53967

RENEWAL OF	ENDORSEMENTS	RATE APPROVED
PH NEW	RIGHT OF RECOVERY	

GENERAL AGENT

Date of Policy 5/29/25 Limits: One Person, $ 5,000.00

Period 12 Months

Terminating 5/29/26 One Accident, $ 20,000.00 Estimated Premium, $ 25.00

This Policy is based upon the following statement of facts, which are warranted by the Assured to be true and correct and in consideration of which the Policy is issued:

1. My full name is GEO. O. JARVIS
2. My age is 52 years.
3. My office is 240 STOCKTON ST. (Street and Number) City SAN FRANCISCO, State CALIFORNIA.
4. I am not interested in any other office, except as follows: NO EXEMPTIONS
5. My residence is STEWART HOTEL, GEARY AND POWELL STREETS, (Street and Number) City SAN FRANCISCO, State CALIFORNIA.
6. I am duly qualified PHYSICIANS AND SURGEON, graduated in the year 1898 from UNIVERSITY OF PENNSYLVANNIA College of UNIVERSITY OF PENN. MEDICAL SCHOOL
7. Since graduation I / we practiced my profession in the following places only: PHILADELPHIA, PENNSYLVANIA - ASHLAND, OREGON AND SAN FRANCISCO, CALIFORNIA.
8. I have no defense or indemnity or liability insurance and have no application for such insurance pending, except as follows: NONE
9. I am a member in good standing in the following medical associations and societies: OREGON STATE & AMERICAN MEDICAL
10. No claim or suit is pending against me for damages on account of alleged error, mistake or malpractice, and no claim has been paid by me, and no judgment has been entered against me for damages on account of alleged error, or mistake, or malpractice, except as follows: NONE - NO EXEMPTIONS
11. I am not in the employ of any person, or firm, or corporation, and I am not connected with any hospital or clinic or other institution, except as follows: NO EXEMPTIONS
12. I have no partner or partners, except as follows: NO EXEMPTIONS
13. I have no assistant or assistants, except as follows: NO EXEMPTIONS
14. I am in good health and in full possession of all senses and free from any intemperate habit, except as follows: NO EXEMPTIONS
15. I do not advertise in the public prints.
16. I agree that the Company shall not be bound by statements made to or knowledge acquired by agents or brokers not written hereon.

Agents.

BROKERAGE

[NOTE] Agent must state below name of Broker or Sub-Agent interested in the risk, and rate of brokerage to be paid

Broker or Sub-Agent W.H. BRINKLEY, 1040 GEARY ST. Brokerage ____ per cent.

United States Circuit Court

No. 18076

Boyd vs. Georgia Casualty Co.

Deft's Exhibit No. B.

Filed Sept. 18, 1925.

WALTER B. MALING, Clerk

By J. N. Schaerlaeken Deputy Clerk

Supdtnces

Supheenas.

Police Volo Cop Ldr of Mem 5/6/25

(Testimony of George O. Jarvis.)

THEREAFTER the testimony of GEORGE O. JARVIS, recalled for defendant, continued as follows:

"Q. At the time you signed this application for a liability policy with the Georgia Casualty Company, prior to that time had you had any claims asserted against you for malpractice by anyone?

Mr. CUNHA.—We object to that on the ground that it calls for the opinion and the conclusion of the witness; the testimony would be hearsay, and not binding on this plaintiff. The further objection is that they would have to demonstrate that there was an actual claim, meeting the requirement of this policy. The mere conclusion of this witness that a claim was made against him would not be binding on the plaintiff. The question calls for his conclusion as to whether a claim was made against him, or not.

The COURT.—Objection overruled.

Mr. CUNHA.—Exception.

A. No, I would not think I had. The thing that that was based on was—

Mr. CUNHA. — Just a moment. You have answered the question.

Mr. BACON.—The doctor is qualifying the answer.

The COURT.—Q. Do you wish to explain the answer?

A. Perhaps I had better explain.

Q. Your answer is no, isn't it? A. Yes.

(Testimony of George O. Jarvis.)

Q. Now, go ahead with your explanation.

A. There was a woman by the name of Mrs. Anne Bertin who came to me a day after she had had hair dye applied to her head, and she wanted to have me do some operation on her [39] face, which I did. The hair dye irritated and infected the whole scalp, without any regard to what I did, whatsoever. She said it was my fault. I said no, it was not my fault. I said, "You had your hair dyed, which I found out the day afterwards, otherwise I would not have touched her, because that type of hair dye frequently causes a widespread inflammation of the scalp. I had other cases come to me since that time, and before. She said she wanted me to pay her hospital bill. I said, "All right." She said she would raise trouble, and I said, "All right, I will do it to save trouble, although it is not my fault in any way, shape, or form."

I paid her hospital bill and took a release from Mrs. Bertin at that time. I paid her a sum of money but I forget the amount. I think it was not as much as $525.00 as I remember it. Although the subpoena directed me to bring the releases I do not have them because I could not find them, but such releases were executed by Mrs. Bertin and her husband. No suit was brought by them. The payment to the Bertins and the execution of the releases by them occurred prior to the time that I signed the application which has been offered in evidence. Mr. Williams, the representative of the Georgia Casualty Company, [40] knew all about it and told

(Testimony of George O. Jarvis.)

me it was not anything. I saw Mr. Williams a number of times as a representative of the Georgia Casualty Company on this and other matters and I told him all about it. I said it was not my fault and he said I should not pay it but I said I would rather pay it than have any fuss about it. I think I was insured in the Georgia Casualty Company at the time I paid the money to Mrs. Bertin.

Cross-examination.

Upon cross-examination by the plaintiff the witness GEORGE O. JARVIS testified as follows:

Mr. Williams, the representative of the Georgia Casualty Company, is sitting right here in the courtroom now. I told him about the affair with Mrs. Bertin. That was before the policy was issued by the Georgia Casualty Company. He told me at the time there was no chance in the world of her recovering because it was not my fault and for me not to pay anything or do anything about it, but I said I would rather pay it than have any fuss about it.

TESTIMONY OF WILLIAM H. WILLIAMS, FOR DEFENDANT.

WILLIAM H. WILLIAMS was thereupon called to the stand as a witness for the defendant and, being duly sworn, testified as follows:

I am the General Agent for the Medical Protective Company of Fort Wayne and I have occupied that position for twelve and one-half years. I have not at any time represented the Georgia Casualty

(Testimony of William H. Williams.)

Company or been employed by the Georgia Casualty Company. [41]

I heard the statement by Dr. Jarvis upon the stand relative to the settlement of a claim of Mrs. Anne Bertin and her husband and the taking of releases. I knew about that circumstance at the time but I had no connection whatever with the Georgia Casualty Company. At that time I was the representative of the Medical Protective Company of Fort Wayne and at that time my company had the policy of insurance against malpractice issued to Dr. Jarvis. The claim of Mrs. Bertin was reported to me as representative of the insurance carrier for Dr. Jarvis at that time. I had something to do with the releases which have been referred to. I met Dr. Jarvis at the office of our attorneys, Ford, Johnson & Bourquin, and Mr. Johnson drew the releases in that case for Dr. Jarvis and Dr. Jarvis told me some three or four days later that the releases had been taken.

Cross-examination.

Upon cross-examination by the plaintiff the witness testified as follows:

I did not see the releases but they were prepared for Mr. and Mrs. Bertin. I do not know whether the release released anyone else besides Dr. Jarvis. My company did not put up the money to get the releases.

Thereupon, in the absence of George F. Keil, manager in San Francisco for the Georgia Casualty Company at the time the policy in question was

(Testimony of William H. Williams.)

issued and whom the defendant desired to produce as a witness on its behalf, it was stipulated by and between counsel for plaintiff and counsel for defendant that the testimony which Mr. Kiel would give would be that, if the answer to statement No. 10 in the application, and which is also [42] repeated in the policy, had been by Dr. Jarvis that he had paid a claim against him for alleged malpractice, the defendant company would not have accepted the risk or issued the policy.

"Mr. CUNHA.—We will stipulate that he would testify to that but we object to the testimony on the ground that it is a self-serving declaration.

The COURT.—Objection overruled. Is that all?

Mr. BACON.—That is all your Honor. The defendant rests."

TESTIMONY OF MRS. AMANDA MAY, FOR PLAINTIFF.

Mrs. AMANDA MAY was then called as a witness for the plaintiff and, being duly sworn, testified as follows:

I know George O. Jarvis. I was his private secretary and business manager in the month of October, 1924 and was familiar with his affairs.

Thereupon objections of defendant to further questions propounded by plaintiff's counsel to the witness relative to the payment by Dr. Jarvis of the claim of Mrs. Anne Bertin against him were sustained by the Court and the following proceedings had:

"Mr. CUNHA.—I think these questions are admissible, your Honor, on the ground they tend to prove the whole transaction.

The COURT.—The doctor was here. Why didn't you ask him these questions? You had an opportunity to examine him, to make him your own witness, or to cross-examine him on that subject.

Mr. CUNHA.—I did attempt to examine him, but [43] objection was made that it was immaterial, irrelevant and incompetent.

The COURT.—You mean as to whether or not he borrowed the money to pay a claim?

Mr. CUNHA.—I mean in regard to what he had done about performing any operation on the lady. I attempted to go into the whole transaction.

The COURT.—It did not make any difference what he did. This woman made some claim that she had been injured. He paid the claim. The operation he performed, it seems to me, was immaterial, in view of that testimony.

Mr. CUNHA.—It would tend to prove whether there was an actual claim that had been made.

The COURT.—He says there was, and he paid the money. There must have been some claim made, or he would not have paid the money."

At the conclusion of the testimony each party moved for judgment in its favor and said motions and the cause were thereupon ordered submitted by the Court for decision.

That thereafter and on the 10th day of October, 1928, the Court ordered that plaintiff have judgment

for the sum of $4,720.75, together with interest on said sum from October 17, 1927, and costs, to which ruling defendant duly excepted.

Now, within the time required by law, the rules of this court and stipulation of the parties said defendant proposes the foregoing as and for its bill of exceptions to the rulings of said Court made during the trial of said action and the decision of said Court, and prays that it may be settled and allowed as correct.

Dated: San Francisco, December 15th, 1928.

REDMAN & ALEXANDER,
Attorneys for Defendant. [44]

STIPULATION TO THE FOREGOING AS THE BILL OF EXCEPTIONS IN THE ABOVE-ENTITLED ACTION AND TO THE CORRECTNESS OF THE SAME.

It is hereby stipulated that the foregoing bill of exceptions is correctly engrossed, is true and correct and that the same may be settled and allowed as defendant's bill of exceptions to the decision and judgment in the above-entitled action.

Dated: December 31, 1928.

HARRY I. STAFFORD,
Attorney for Plaintiff.
REDMAN & ALEXANDER,
Attorneys for Defendant.

ORDER SETTLING, CERTIFYING AND ALLOWING BILL OF EXCEPTIONS.

The attached and foregoing bill of exceptions now being presented in due time and found to be correct, I do hereby certify that the said bill is a full, true and correct bill of exceptions in the above action and that the recitals therein regarding the evidence are true and correct and the same is accordingly hereby approved, settled, certified and allowed.

Dated: January 4th, 1929.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Service of the within proposed bill of exceptions admitted this 15th day of December, 1928.

HARRY I. STAFFORD,
Attorney for Plaintiff.

Filed Jan. 3, 1929. [45]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable A. F. ST. SURE, Judge of the United States District Court:

The above-named defendant Georgia Casualty Company, a corporation, feeling aggrieved by the decision and order of the Court made and entered on the 10th day of October, 1928, granting to plaintiff judgment in the sum of $4,720.75, together with

interest on said sum from October 17, 1927, and costs, and by the judgment of the Court entered herein on the 10th day of October, 1928, in accordance with said order and decision, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set forth in the assignment of errors filed herewith and it prays that its plea be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the [46] Ninth Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said United States Circuit Court of Appeals and that the proper order relating to and fixing the amount of security to be required of it be made.

And your petitioner will ever pray, etc.

Dated: San Francisco, January 3d, 1929.

REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: Filed January 3, 1929. [47]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Georgia Casualty Company, a corporation, the defendant in the above-entitled action, and contends that, in the record, opinion, decision and final judgment in said cause, there is manifest and material error, and in connection with and as a part of its appeal herein makes and files the following assignments of error upon which it will rely in the prosecution of its appeal in said cause:

I.

That the United States District Court for the Northern District of California erred in deciding that the false statement of Dr. George O. Jarvis (the insured) that no claim had been paid by him on account of alleged error or mistake or malpractise in his application to defendant for the policy of indemnity insurance upon which this action is based was not a breach of warranty, avoiding the policy.

II.

That said Court erred in deciding that the false statement of Dr. George O. Jarvis (the insured) that no claim had been [48] paid by him on account of alleged error or mistake or malpractice in his application to defendant for the policy of indemnity insurance upon which this action is based was not a false representation as to a fact material to the acceptance of the risk by defendant which

avoided the policy and entitled defendant to rescind said policy or contract of insurance.

III.

That said Court erred in deciding that the policy of insurance was not rescinded in the manner and within the time provided by law.

IV.

That said Court erred in deciding that, since the right of the plaintiff to sue for damages for injuries sustained had accrued during the life of the policy and before the attempted rescission, such right was therefore not affected by anything that may have occurred thereafter between the insurer and the insured.

V.

That said Court erred in refusing to decide or hold that plaintiff was bound by the notice of rescission of the policy given by defendant to the insured, Dr. George O. Jarvis.

VI.

That said Court erred in refusing to decide or hold that the policy of insurance upon which plaintiff sued was rescinded in the manner and within the time provided by law and that such rescission precluded any recovery thereon by plaintiff.

VII.

That said Court erred in refusing to decide that appellant was entitled to rescind the contract or policy of insurance at any time before the commencement of an action upon the [49] contract

or policy and that such rescission was binding upon the plaintiff.

VIII.

That said Court erred in holding that Dr. George O. Jarvis, the insured, had performed all the conditions of said policy to be by him kept and performed.

IX.

That said Court erred in ordering, in rendering and in entering the final judgment herein dated October 10, 1928.

X.

That said Court erred generally in refusing to order judgment in favor of defendant and against plaintiff.

XI.

That said Court erred in ordering judgment for plaintiff against defendant in the sum of $4,720.75, together with interest on said sum from October 17, 1927, and costs.

XII.

That said Court erred in ordering judgment for plaintiff for any sum at all.

XIII.

That said Court erred in refusing to order judgment for defendant upon the evidence in said cause.

XIV.

That said Court erred in deciding that the evidence was sufficient to justify a judgment for the plaintiff, and that the evidence was not sufficient to justify a judgment for the defendant.

WHEREFORE, defendant prays that said order and judgment be reversed, and that an order be entered reversing the order and judgment of the lower court in said cause, and that said [50] Court be directed to render and enter judgment in favor of defendant.

Dated: San Francisco, January 3d, 1929.

REDMAN & ALEXANDER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 3, 1929. [51]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of Messrs. Redman & Alexander, attorneys for the above-named petitioner and defendant Georgia Casualty Company, a corporation, and upon filing the petition of said defendant for appeal,—

IT IS ORDERED that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the order and judgment entered herein on the 10th day of October, 1928, in favor of plaintiff and against said defendant, and that the amount of the bond as required by law on said appeal be and the same is hereby fixed at the sum of $6,000.00; and said bond shall act as a supersedeas and cost bond and execution shall be stayed pending the outcome of said appeal.

Dated: January 4, 1929.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Jan. 4th, 1929. [52]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Georgia Casualty Company, a corporation, as principal, and National Surety Company, a corporation organized and existing under the laws of the State of New York and duly authorized to transact business and issue surety bonds in the State of California, as surety, are held and firmly bound unto Laurett Boyd in the sum of Six Thousand Dollars ($6,000.00), to be paid to the said Laurett Boyd, her executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seal and dated this 4th day of January, 1929.

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California, Second Division, in a suit pending in said court between Laurett Boyd, plaintiff, and Georgia Casualty Company, a corporation, defendant, a judgment was rendered against the said defendant on the [53] 10th day

of October, 1928, for the sum of $4,720.75, together with interest on said sum from October 17, 1927, and costs; and

WHEREAS, the said defendant, Georgia Casualty Company, having obtained from said court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said Laurett Boyd citing and admonishing her to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty days from the date of said citation,—

NOW, THEREFORE, the condition of this obligation is such that, if the said defendant, Georgia Casualty Company, shall prosecute its said appeal to effect and satisfy the judgment against it and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void; otherwise, to remain in full force and effect.

And further the undersigned Surety agrees that in case of a breach of any condition hereof, the above-entitled court may, upon notice to the undersigned National Surety Company of not less than ten (10) days, proceed summarily in the above-entitled cause to ascertain the amount which said National Surety Company as Surety is bound to pay on account of such breach and render judgment therefor against it and award execution thereof,

not exceeding, however, the sums specified in this undertaking.

GEORGIA CASUALTY COMPANY.
By ARTHUR M. BROWN,
Its Attorney-in-Fact.
NATIONAL SURETY COMPANY.
[Seal] By H. C. ROACH,
Its Attorney-in-Fact. [54]

The within and foregoing bond on appeal is hereby approved, both as to sufficiency and form.

Dated: January 5, 1929.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed January 5th, 1929. [55]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Above-entitled Court:

Please prepare record on appeal in the above-entitled cause and include therein the following:

Second amended complaint—filed May 2, 1928.

Answer to second amended complaint—filed July 13, 1928.

Stipulation waiving trial by jury—filed Sept. 18, 1928.

Amendment to second amended complaint—filed Sept. 18, 1928.

Memorandum opinion ordering judgment for plaintiff—filed October 10, 1928.

The judgment entered in the above cause in favor of plaintiff and against defendant—filed Oct. 10, 1928.

Stipulation as to Plaintiff's Exhibit No. 2 on appeal—filed December 8, 1928.

Engrossed bill of exceptions.

Petition for appeal.

Assignment of errors.

Order allowing appeal.

Citation on appeal.

Bond on appeal.

This praecipe.

Dated January 4th, 1929.

REDMAN & ALEXANDER,
Attorneys for Defendant.

Service of the within praecipe for transcript of record admitted this 5th day of January 1929, and stipulated the papers and documents therein mentioned are sufficient for said transcript.

HARRY I. STAFFORD,
DEAN CUNHA,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 5th, 1929. [56]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 56 pages, numbered from 1 to 56, inclusive, to be a full, true and correct copy of the record and pro-

ceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $31.25; that the said amount was paid by the defendant and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 2d day of February, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [57]

CITATION ON APPEAL.

United States of America,—ss.
The President of the United States, to Laurett Boyd and Messrs. Harry I. Stafford and Dean Cunha, Her Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Laurett Boyd was plaintiff and Georgia

Casualty Company, a corporation, was defendant, and wherein Georgia Casualty Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, this 5th day of January, A. D. 1929.

A. F. ST. SURE,
United States District Judge.

Receipt of the within citation on appeal is acknowledged this 5 day of January, 1929.

HARRY I. STAFFORD.
DEAN CUNHA.

[Endorsed]: Filed Jan. 5, 1929. [58]

[Endorsed]: No. 5708. United States Circuit Court of Appeals for the Ninth Circuit. Georgia Casualty Company, a Corporation, Appellant, vs. Laurett Boyd, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 2, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5708

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGIA CASUALTY COMPANY,
a corporation,
Appellant,

vs.

LAURETT BOYD,
Appellee.

APPELLANT'S BRIEF.

REDMAN, ALEXANDER & BACON,
333 Pine Street, San Francisco.
Attorneys for Appellant.

Parker Printing Company, 523 Clay Street, San Francisco

Subject Index.

Table of Cases Cited

No. 5708

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGIA CASUALTY COMPANY,
a corporation,
Appellant,

vs.

LAURETT BOYD,
Appellee.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This case involves an action by the appellee, Laurett Boyd, against the appellant, Georgia Casualty Company, upon a physician's liability insurance policy, issued in May, 1925, by appellant to one Dr. George O. Jarvis, a physician practising his profession in San Francisco. The action is predicated upon a judgment secured by appellee against Dr. George O. Jarvis on October 17, 1927, based upon the alleged negligence or malpractise of Dr. Jarvis in performing an operation upon appellee in November, 1925 (printed Transcript, pp. 1-5).

Appellant contested appellee's claim against the policy issued by it to Dr. Jarvis upon the sole ground

that Dr. Jarvis had made a false statement in his application for said policy, which false statement by the applicant was a breach of warranty or a misrepresentation or concealment of a fact material to the contract, thereby avoiding the policy (Tr. pp. 6-11), and entitling the company to rescind the policy, which it did.

THE ISSUE.

The question for determination here is: whether a breach of warranty or misrepresentation of a material fact by the insured, Dr. George O. Jarvis, in his application to appellant for a physician's liability insurance policy entitled appellant insurance company to rescind such policy after appellee's claim against Dr. Jarvis for malpractise arose, but *before* any action was commenced by appellee against Dr. Jarvis, the insured, for damages for such malpractise, and of course long before any action was commenced by her upon the policy.

The trial court held that "the right of the plaintiff to sue for damages for injuries sustained had accrued during the life of the policy and before the attempted rescission; such right was therefore not affected by anything that may have occurred thereafter between the insurer and the insured" (Tr. pp. 15-16).

We respectfully contend that the statement of the insured, Dr. George O. Jarvis, in his application for

the policy was false under his own uncontradicted testimony; that such false statement constituted a breach of warranty or misrepresentation as to a material fact, entitling the appellant to rescind the policy; that the policy was rescinded within the time and in the manner prescribed by statute *before* any action was commenced by appellee against insured or insurer; and, finally, that the District Court erred in holding that the rescission of the policy by appellant upon the ground of the insured's breach of warranty or misrepresentation in his application did not affect any "right" appellee may have had against the policy.

THE EVIDENCE.

It appears from the evidence that in May, 1925, Dr. Jarvis made written application (Tr. pp. 39-41; defendant's Exhibit "B") to the defendant for a physician's liability policy, and that, pursuant to such application, the policy applied for was issued by defendant to Dr. Jarvis (Tr. pp. 23-24; plaintiff's Exhibit "1"). It also appears from the testimony and the record that notice in writing of rescission of the policy in question was given to Dr. Jarvis by the defendant on August 26, 1926 (defendant's Exhibit "A"; Tr. pp. 35-36). The premium paid by Dr. Jarvis for the policy was returned to him at the same time (Tr. p. 30).

The ground for rescission by the company was the falsity of a statement made by the insured in his application as follows:

> "No claim or suit is pending against me for damages on account of alleged error, mistake or malpractise, and no claim has been paid by me, and no judgment has been entered against me for damages on account of alleged error, or mistake, or malpractise, except as follows: *None*" (Tr. pp. 30-41; defendant's Exhibit "B").

The falsity of this statement is established by testimony of Dr. Jarvis himself that he had, prior to signing said application, paid a claim asserted against him by one Mrs. Anne Bertin on account of his alleged malpractise in treating her (Tr. pp. 44-45).

It further appears that Mrs. Boyd, the appellee in this case, made claim against Dr. Jarvis for his alleged malpractise, in November, 1925, in treating her, and that, on September 21, 1926 (after appellant had given notice of rescission of the policy to Dr. Jarvis), she commenced an action in the Superior Court of the City and County of San Francisco, State of California, against Dr. Jarvis for damages for the alleged malpractise, which she prosecuted to judgment against Dr. Jarvis, judgment having been docketed on October 19, 1927.

On December 13, 1927, appellee commenced this action against appellant, Georgia Casualty Company, upon the policy of insurance issued by it to Dr. Jarvis.

In its answer, appellant pleaded the avoidance of the policy by the falsity of the statement by Dr. Jarvis in his application (and incorporated in the policy) that "no claim has been paid by him" for an alleged malpractise (Tr. p. 9).

ARGUMENT AND AUTHORITIES.

I.

THE STATEMENT OF THE INSURED, DR. GEORGE O. JARVIS, THAT NO CLAIM HAD BEEN PAID BY HIM IS A WARRANTY. THE FALSITY OF THIS STATEMENT WAS A BREACH OF THE WARRANTY GIVING THE COMPANY THE RIGHT TO RESCIND.

The facts of this case are simple and there is no conflict in the testimony. Dr. George O. Jarvis, the insured, filled out in his own handwriting and signed an application addressed to the Georgia Casualty Company for a physician's liability policy. In that application he stated, among other things:

> "10. No claim or suit is pending against me for damages on account of alleged error or mistake or malpractise and *no claim has been paid by me* and no judgment has been entered against me for damages on account of alleged error or mistake or malpractise, except as follows: *None.*"

The application provided that the statements made in it "are warranted by the assured to be true and correct, and in consideration of which the policy is issued" (Tr. p. 39).

Pursuant to the application as submitted, the company issued to Dr. Jarvis the policy applied for, in which it was provided that:

> "Georgia Casualty Company, Macon, Georgia (herein called the Company), a stock company, in consideration of twenty-five dollars ($25.00) premium, *and the statements contained in the schedule endorsed hereon and made a part hereof,*

> which statements the assured makes and represents to be true by the acceptance of this policy, does hereby agree to indemnify Dr. George O. Jarvis, etc."

The "Schedule of Statements" endorsed on the policy states that

> "this policy is based upon the following statements which are represented by the assured to be true and correct, and in consideration of which the policy is issued:"

and statement No. 10 in the Schedule of Statements endorsed on the policy is the same as statement No. 10 in the application, with the answer "No exceptions".

The testimony is positive and without conflict that Dr. Jarvis had, prior to the time that he signed the application and prior to the issuance of the policy to him by the appellant, paid a claim asserted against him by one Mrs. Anne Bertin, who suffered an infection following an operation by the doctor and who claimed that the infection was the fault of the doctor (Tr. pp. 44-45). This evidence clearly establishes the falsity of the statement in the application and in the Schedule of Statements in the policy that the insured had paid no claim. The trial court was convinced of the falsity of the statement in the application, as appears from the following excerpt from the record:

> "The COURT. It did not make any difference what he did. This woman made some claim that she had been injured. He paid the claim. The operation he performed, it seems to me, was immaterial, in view of that testimony.

Mr. CUNHA. It would tend to prove whether there was an actual claim that had been made.

The COURT. He says there was, and he paid the money. There must have been some claim made, or he would not have paid the money" (Tr. p. 48).

The evidence shows that, upon learning of the falsity of the statement and on August 26, 1926, the appellant delivered to Dr. Jarvis a notice of rescission and with it returned to him the premium which he had paid for the policy (Tr. p. 35). This was done *before* the appellee in this case had commenced her action against the doctor in the Superior Court of the City and County of San Francisco in which she secured a judgment against him. The present suit upon the policy was not filed until December 13, 1927.

The law applicable to the facts in this case is clear and positive. Whether the statement in the application be construed as a *warranty* or a *representation* or a *concealment* is immaterial; the falsity of the statement rendered the policy voidable and gave the company the right to rescind.

We contend that the statement by Dr. Jarvis that he had paid no claim asserted against him is a *warranty* under the provisions of the California Civil Code, which are as follows:

Sec. 2604. "No particular form of words is necessary to create a warranty."

Sec. 2605. "Every express warranty, made at or before the execution of a policy, must be con-

tained in the policy itself, or in another instrument signed by the insured and referred to in the policy, as making a part of it."

Sec. 2606. "A warranty may relate to the past, the present, the future, or to any or all of these."

Sec. 2607. "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof."

Sec. 2610. "The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind."

Sec. 2612." A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk."

The statement by the doctor that he had paid no claim was made at or before the execution of the policy and is contained in the policy itself; the statement was of a matter relating to the person insured and to the risk as being a fact. It therefore was an *express* warranty within the meaning of the above code sections. Being a warranty, the materiality or immateriality of the statement is of no importance; the falsity of the statement gave the company the right to rescind and is a complete defense to this action.

"The falsity of warranties renders the policy issued in reliance thereon void, and constitutes a defense to an action upon the policy, although the breach may not have contributed to the loss. The

fact that statements were made in good faith is immaterial. * * * One of the very objects of a warranty is to preclude all controversy about the materiality or immateriality of the statement."

14 *Cal. Juris.*, p. 494.

See also:

Wolverine Brass Works v. Pacific Coast Cas. Co., 26 Cal. App. 183; 146 Pac. 184;

McKenzie v. Scottish etc. Ins. Co., 112 Cal. 548; 44 Pac. 922.

Warranties are *affirmative* or *promissory*. *Affirmative* warranties are those which assert the existence of a fact at the time of insurance and avoid the contract if the allegation is untrue; a *promissory* warranty is one which requires something shall be done or omitted after the insurance takes effect and during its continuance, and avoids the contract if the thing to be done or omitted is not done or omitted accordingly.

14 *Cal. Juris.* 495, 505;

McKenzie v. Scottish etc. Ins. Co., supra.

"A breach of an affirmative warranty consists in the falsehood of the affirmation, when made, while that of a promissory warranty, which is executory in its nature, is the nonperformance of the stipulation."

14 *Cal. Juris.* 493;

Cowan v. Phoenix Ins. Co., 78 Cal. 181; 20 Pac. 408.

The statement by the insured (Dr. Jarvis) in the application and policy that he had paid no claim for alleged error or mistake or malpractise was, therefore, an *affirmative warranty;* and, since that statement was untrue, it constituted a breach of the warranty which avoided the policy.

> "It has been said that the purpose of warranties and conditions is to protect the insurer from liability on risks which he is unwilling to take for the stipulated premium, or perhaps for any premium."
>
> 14 *Cal. Juris.* 492.

See also:

Goorberg v. Western Assurance Co., 150 Cal. 510; 89 Pac. 130;

Finkbohner v. Glenn Falls Ins. Co., 6 Cal. App. 379; 92 Pac. 318.

The law in California upon this subject conforms to the general rule. The United States Supreme Court has said that, in case of a warranty, the right of the plaintiff to recover is defeated upon proof that an answer to any of the questions in the application is untrue, without regard to the materiality of the questions or the good faith of the answer.

Ins. Co. v. Trefz, 104 U. S. 197, 202; 26 L. Ed. 708;

Jeffries v. Life Ins. Co., 22 L. Ed. 833;

Piedmont etc. Life. Ins. Co. v. Ewing, 23 L. Ed. 610.

II.

EVEN IF THE STATEMENT BE CONSTRUED AS A REPRESENTATION, THE FALSITY OF IT GAVE COMPANY RIGHT TO RESCIND AND IS A COMPLETE DEFENSE TO THIS ACTION.

If the statement of Dr. Jarvis that he had not paid any claim against him on account of alleged error or mistake or malpractise be construed as a *representation,* and not as a warranty, nevertheless it was *material* to the acceptance of the risk, and therefore is a complete defense to this action upon the policy.

The Civil Code of the State of California contains a statement of the law upon the subject of concealment and representations as applicable to insurance contracts. The sections of importance here are as follows:

> Sec. 2561. "A neglect to communicate that which a party knows, and ought to communicate, is called a concealment."
>
> Sec. 2562. "A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance."
>
> Sec. 2563. "Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty."
>
> Sec. 2565. "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his

estimate of the disadvantages of the proposed contract, or in making his inquiries."

Sec. 2579. "A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations."

Sec. 2580. "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false."

In the light of the foregoing provisions of the California Civil Code, it will be seen that the falsity of the insured's statement in his application for the policy was at least a misrepresentation, entitling the appellant to rescind the contract of insurance because it was material to the acceptance of the risk by the company. The fact that the parties asked and answered the question relative to the payment of a claim against him by the insured establishes the materiality of the statement. Where the representations are in the form of written answers made to written questions, the parties have, by putting and answering the questions, indicated that they deemed the matter to be material.

"The inquiry shows that the insurer considers the fact material, and an answer by the insured affords a just inference that he assents to the insurer's view. The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not, therefore, open to be tried by the jury."

May on Insurance, Sec. 185;

McEwen v. N. Y. Life Ins. Co., 23 Cal. App. 694, 697; 139 Pac. 242.

"The fact that the company makes a specific inquiry of the insured as to a particular matter establishes its materiality. Although the answer to a question asked by insurer may not be material in itself, it may be rendered material by the fact that the effect of the answer is to prevent the company from pursuing his inquiry as to material matters."

32 *Corpus Juris,* 1289;

Snare etc. Co. v. St. P. F. & M. Co., 258 Fed. 425.

But even if the statement is not "deemed" to be material from the fact that the question was asked and answered by the parties in the case at bar, the materiality has nevertheless been affirmatively established by the testimony. The stipulated testimony of Mr. Keil, the manager of the defendant company at the time the policy in question was issued, was that, if the answer to statement No. 10 in the application by Dr. Jarvis had been that he had paid a claim asserted against him for alleged error or mistake or malpractise, the company would not have issued the policy (Trans. p. 47). It therefore follows that the policy was avoided by a false representation as to a fact material to the acceptance of the risk, which gave the company the right to rescind and constitutes a complete defense to this action upon the policy.

In the case of

Rankin v. Amazon Ins. Co., 89 Cal. 203; 26 Pac. 872,

involving an action on a fire insurance policy, the

policy referred to an application and survey containing questions and answers. The Court said:

> "The fact that the survey was not furnished until after the policy was delivered may have deprived it of any force or effect as a *warranty,* under Sec. 2605 of the Civil Code; but conceding this to be true it does not destroy its effect as a representation of facts made as an inducement for the issuance of the policy. * * * If any of the material representations were false, the defendant's tender of the premium and notice that the policy was cancelled before the commencement of the suit operated to rescind the contract (Civ. Code, Secs. 2580, 2583)."

In another case the California District Court of Appeal said:

> "Where the applicant for an insurance policy signs an application certifying to the truth of statements therein contained material to the risk and delivers it to the defendant, those statements become his solemn representations. * * *"
>
> "The further fact that the insurer exacted and the applicant gave a statement as to previous injuries to his eyes or defects of vision, proves that the parties considered and agreed that this matter was material. Having so agreed, the fact of its materiality is binding upon them."
>
> *Porter v. Gen. Acc. etc. Assur. Corp.,* 30 Cal. App. 198, 204, 205; 157 Pac. 825.

A material misrepresentation, whether affirmative or promissory, entitles the injured party to rescind the contract from the time when the representation becomes false.

14 *Cal. Juris.* 490.

"A fraudulent misrepresentation will avoid the contract whether it is expressly so stipulated or not. Representations are *dehors* the contract."

Wheaton v. North British etc. Ins. Co., 76 Cal. 415, 424; 18 Pac. 758.

For lack of substantial truth, the fact that the answer was made in good faith is no valid excuse.

Ins. Co. v. Trefz, 104 U. S. 197; 26 L. Ed. 708.

Whether a question is immaterial depends upon the question itself. But if, under any circumstances, it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial.

Jeffries v. Life Ins. Co., 22 L. Ed. 833.

It is the duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risk; and when any circumstance is withheld, however slight and immaterial it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy.

Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 510; 27 L. Ed. 337;

Clark v. Manufacturers' Ins. Co., 8 How. 235, 248; 12 L. Ed. 1061.

III.

THE POLICY WAS RESCINDED IN THE MANNER AND WITHIN THE TIME REQUIRED BY LAW.

Under the California Civil Code, if a representation is false in a material point, whether affirmative or promissory, the insurer is entitled to rescind the policy from the time when the representation becomes false.

> Sec. 2580 *Civil Code of California;*
> *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 26 Pac. 872.

The time of rescission is fixed by Sec. 2583 of the Civil Code of California, which provides as follows:

> "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract."

The notice of rescission of the policy was given to Dr. Jarvis on August 26, 1926 (defendant's Exhibit "A"; Tr. pp. 35-36), and the premium paid by him for the policy was returned to him at the same time (Tr. p. 30). The appellee's suit against Dr. Jarvis was not commenced until September 21, 1926, and the present suit upon the policy was not filed until December 13, 1927. Notice of rescission was, therefore, given within the time required by law and before the commencement of *any* action, either against the assured or against the company upon the policy. And at the time of notice of rescission the company re-

turned to the assured the premium in full received from him in payment for the policy. This action on its part constituted a complete and legal rescission of the contract, and no policy was, therefore, in existence at the time of the commencement of the action upon the policy and not even at the time of the commencement of appellee's prior action against Dr. Jarvis.

IV.

THE CASES CITED BY APPELLEE IN THE LOWER COURT ARE NOT IN POINT.

Appellant will have no opportunity to make written reply to appellee's brief, so will take occasion at this time to show that the cases cited by appellee in the trial Court are not in point in the case at bar.

In the trial Court appellee argued that the rescission of the policy by the company was "ineffective as to this plaintiff (appellee)", and cited as authority for that contention:

Malmgren v. Southwestern etc. Ins. Co., 201 Cal. 29;

Pigg v. International Indemnity Co., 86 Cal. App. 671;

Finkelburg v. Continental Casualty Co., 126 Wash. 543; 219 Pac. 12;

Stusser v. Mutual Union Ins. Co., 127 Wash. 449; 221 Pac. 331.

The *Malmgren* case, supra, is not in point and is of no assistance to the Court in the case at bar. It merely holds that the California statute (Stats. 1919, p. 776; see Tr. pp. 12-13) is a part of every indemnity policy issued in the State of California, giving a person injured by the insured a right of action upon the policy after judgment against the insured, if he is insolvent. More particularly, it holds that a return of execution unsatisfied is unnecessary to an action upon the policy, but that insolvency of the judgment debtor may be established in some other way. These matters are not involved in the case at bar. We concede the insolvency of the insured, Dr. Jarvis; we concede that appellee could maintain this action upon the policy issued by appellant to Dr. Jarvis, if the policy had not been rescinded by appellant prior to the commencement of such action because of the false statement in Dr. Jarvis' application for the policy. In the *Malmgren* case there had been no breach of warranty or misrepresentation of a material fact in the application for the policy, and the policy had never been rescinded but was a valid, existing policy at the time the plaintiff commenced the action upon it. Consequently, that case is clearly not in point here.

Pigg v. International Indemnity Co., supra, likewise is not authority upon the issue in the case at bar. It involved much the same issue as the *Malmgren* case, the California District Court of Appeal holding that the insolvency endorsement required by the California statute (Stats. 1919, p. 776) was a part of the in-

demnity policy "even though not incorporated therein." There was an attempt in the *Pigg* case on the part of the indemnity company to defend against the action upon the policy upon the ground that the insured did not cooperate with the company in the defense of the case, as required by the policy, but the Court held that the *evidence* did not support this defense.

The *Finkelburg* and *Stusser* cases, supra, are decisions of the Supreme Court of the State of Washington, and neither of them supports the decision of the trial Court in the case at bar. Both of these cases pass upon the right of a third party to sue upon a policy and to what extent the company can defend for the failure of the assured to give notice of accident or give notice of an action against the assured. None of these things is involved in the case at bar. Our defense is not that Dr. Jarvis failed to do something required by the policy *after* the alleged act or omission in connection with the treatment of Mrs. Boyd; our defense is that, because of the false statement in Dr. Jarvis' application, the company was induced to issue a policy of insurance which it would not have issued had his answer been in accordance with the facts. This was a breach of an affirmative warranty (or at least a material misrepresentation) which affected the validity of the policy and gave the company the right to rescind, as it did. It is quite different from the failure of an assured to do something required by a *valid,* existing policy, such as failure to give notice of

accident, failure to give notice of suit, failure to cooperate with the company in the defense of the action, etc.

In the trial Court, counsel for appellee also contended that "plaintiff's right to judgment against defendant is *absolute.*" This is indeed an extravagant statement. It means that there is no defense whatsoever to an action by a third party upon a policy of liability insurance. Such a contention is manifestly absurd.

Counsel apparently based this contention upon the "insolvency endorsement" appearing upon the policy, pursuant to the California statute (Tr. pp. 12-13). But this statute does nothing more than give a person who has secured a judgment against the insured *the right to sue* the insurance carrier upon the policy in the event of the insolvency or bankruptcy of the insured. It does not take away from the insurance carrier the right to defend against such a suit where the policy has been secured by a misrepresentation of the assured in applying for the policy, or where he has committed a breach of an affirmative warranty, as in the case at bar. If the statute could be said to go so far as that, it would impliedly repeal all of the provisions of the Civil Code upon the subject of warranties and representations applicable to insurance contracts. Aside from the fact that repeals by implication are frowned upon, there is no such implication in this statute.

The statute (Stats. 1919, p. 776) specifically provides that an action on the policy is "subject to its terms and limitations." And in the *Malmgren* case, supra, the Court recognized that this limitation "has reference to those matters concerning which the insurer and assured could legally contract."

The defense in the case at bar is concerned with the validity of the policy itself. The company was in effect defrauded into issuing the policy by the false statement in the application for the policy. Having subsequently discovered the falsity of this statement, the company, within the time and manner provided by law (Secs. 2580 and 2583, *Civil Code of California),* rescinded the policy. The contention of counsel for appellee that plaintiff's right to judgment against defendant is "absolute" and that the company cannot assert this defense, is without support of any decision or authority whatsoever.

The case of

Kruger v. Cal. Highway Ind. Exchange, 74 Cal. Dec. 172,

cited by appellee, is not authority for that proposition and is not in point. In that case the Court was construing a "jitney bus" *bond,* executed pursuant to the provisions of the "jitney bus" ordinance of the City of Los Angeles. The bond in that case, as required by the statute, *specifically guaranteed* the payment of any judgment against the "jitney bus" driver on whose behalf the bond was executed. No question of the validity of the bond was raised, but the defendant

surety company attempted to avoid liability upon the ground that the principal ("jitney bus" driver) failed to report the action against him to the surety company. A default judgment was taken against the principal, which became final, and thereafter suit was filed upon the bond. The appellate Court merely held that, having *guaranteed* the payment of *any* judgment against the principal, the indemnity company was bound by the judgment, even though its principal had failed to notify it of the action. The ordinance in that case, which required a bond from the "jitney bus" *guaranteeing* the payment of any judgment against it, is quite different from the California insolvency statute (Stats. 1919, p. 776), which merely *permits a suit* upon a liability policy issued to a private citizen after judgment against the assured and in the event of his insolvency. Furthermore, the defense that the "jitney bus" driver failed to notify the surety company of the accident is quite different from the defense asserted by the appellant in the case at bar, that the policy was avoided by insured's breach of warranty or misrepresentation and rescinded.

The best indication that the California appellate courts did not in the *Malmgren, Pigg* and *Kruger* cases, supra, intend to, and in fact did not, deprive a liability insurance carrier of the defense asserted by appellant in the case at bar is found in the later case of

Bryson v. International Indemnity Co., 55 Cal. App. Dec. 87 (advance sheets),

which specifically holds that, although the statutory insolvency endorsement in the policy permits an action upon the policy by a third party who has secured a judgment against an insolvent insured, such action is nevertheless subject to the *terms* and *limitations* of the policy. The headnote to the cited case reads as follows:

> "In an action brought against the insurance carrier upon a policy of automobile liability insurance by the holder of a judgment against the insolvent insured, the judgment of the plaintiff is conclusive *only in respect to matters adjudged, and the carrier is not estopped by reason of the judgment in favor of the plaintiff against the insured, to defend that he is not liable under the terms of the policy as an indemnitor.*" (Italics ours.)

The insurance carrier denied liability in that case upon the ground that the claimant at the time of the accident was "being transported by the insured for an implied consideration," contrary to the terms of the policy. The issue raised by this defense did not receive the consideration of the trial Court, which proceeded upon the erroneous theory that defendant was estopped to raise this question. The appellate Court reversed the judgment and directed that the trial Court retry the issue raised by this defense. The appellate Court said:

> "Since the policy provides for an action on such a judgment by the injured person against the company, under the circumstances stated, *the evident intent is that such person shall have the rights which the insolvent insured would have*

had if he had paid the judgment. Such a judgment is conclusive only in respect to the matters adjudged. No one would contend that it precludes the company from defending on the ground that it did not issue the alleged policy or that the policy issued by it does not cover the motor vehicle which caused the injury. It seems equally clear that the company may show in defense that its policy does not indemnify against liability for damage to persons of the class to which the injured person belongs. (1) In other words, before the company can be held liable as an indemnitor it must be proved that it is an indemnitor. 'While one who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings, *a judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it.*' (14 R. C. L. 62; 31 C. J. 461; Pezel v. Yerex, 56 Cal. App. 304, 309.)" (Italics ours.)

Bryson v. Int. Ind. Co., supra.

CONCLUSION.

The material facts in this case are without conflict. Appellant company issued a physician's indemnity policy to Dr. Jarvis upon his written application for the same. Thereafter, and on August 26, 1926, the company rescinded said policy upon the ground of Dr. Jarvis' breach of warranty, or misrepresentation of a material fact in his application, giving Dr. Jarvis

written notice thereof and returning therewith the premium paid by him for the policy. On September 21, 1926, appellee commenced an action against Dr. Jarvis for his alleged malpractise in performing an operation upon her in November, 1925, and in October, 1927, a judgment was secured in said action in favor of appellee and against Dr. Jarvis. In December, 1927, appellee commenced this action against appellant upon the policy, which had been rescinded some sixteen months before.

There is only one issue in the case, and that is, whether or not appellee is entitled to recover upon the policy, which had been rescinded by appellant in the manner and well within the time provided by law (some sixteen months before action was commenced by appellee upon the policy), for the alleged error, mistake or malpractise of Dr. Jarvis in performing the operation upon appellee before the rescission of the policy.

The holding of the trial Court that the rescission of the policy did not defeat appellee's right to recover upon the policy is erroneous and finds no support in any statute or decision. We respectfully submit that the judgment of the lower court should be reversed and judgment ordered for appellant.

Respectfully submitted,

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Attorneys for Appellant.

Dated: San Francisco, Calif.,
May 18, 1929.

No. 5708

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGIA CASUALTY COMPANY (a corporation),
Appellant,

vs.

LAURETT BOYD,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

A restatement of the facts of this case is necessary for clarity and for the purposes of appellee's argument to this Court. The appellee, Laurett Boyd, recovered a judgment against Dr. George O. Jarvis on October 17th, 1927, based upon the negligence of Dr. Jarvis, in performing an operation upon appellee in November, 1925 (Tr. pp. 1-5, 18, 25-27). Thereafter, for the purpose of recovering the amount of the judgment, appellee brought this action against the appellant, Georgia Casualty Company, upon the policy of physicians' liability insurance, issued in May, 1925, by appellant to said Dr. George O. Jarvis. The action was brought under the terms of the California Statute (Stats. 1919, p. 776), which provides that a person who is injured by one that is insured, and who pro-

cures a judgment against the insured for the injury, may sue the insurance carrier of the insured directly, upon the policy, to recover the amount of the judgment.

The case was tried by the District Court, a jury having been waived by written stipulation of the parties and filed with the Court (Tr. p. 14). No request for special findings of fact or special conclusions of law having been made, the Court on October 10th, 1928, made its general finding in favor of appellee and ordered judgment in accordance therewith (Tr. p. 48).

The appellant in the District Court, opposed appellee's claim upon the sole ground that Dr. Jarvis had made a false statement in his application for said policy. That said false statement was a breach of warranty, or a misrepresentation, or concealment of a fact material to the contract, thereby avoiding the policy and entitling the company to rescind the policy in toto and as to all persons.

The appellant for the purpose of rescission, sent a notice of rescission of the policy, on which the appellee's action is brought, to Dr. Jarvis, the insured, and also, returned therewith, the amount of the premium. Said notice was dated August 26th, 1926. The appellant never sent any notice of rescission to appellee, either as to herself, or to Dr. Jarvis, nor did appellant attempt in any manner, or by any means, to effect that rescission as to appellee other than by the notice of rescission sent to Dr. Jarvis (Tr. p. 35). This notice of rescission was not sent until after the negligent operation.

APPELLEE'S CONTENTIONS.

The appellee contends:

1. That in view of the condition of the record, the only action this Honorable Court can take is to affirm the judgment of the District Court.

2. That under the California statute (Stats. 1919, p. 776), every contract of indemnity insurance now written in the state of California is a tri-party agreement; that the rights of the injured person under said policy of insurance accrue at the time of the accident or injury and that the liability of the company to the insured person cannot be affected by any subsequent action taken as between the insurer and the insured.

3. That under the aforementioned statute, defenses that the insurer may have against the insured cannot be asserted against the injured person.

I.

THE CONDITION OF THE RECORD IN THIS CASE REQUIRES AN AFFIRMANCE OF THE JUDGMENT.

The appellant states that its sole ground of opposition to appellee's claim is the asserted breach of the policy by Dr. Jarvis and its subsequent purported rescission based thereon; or as appellee views it, appellant is contending that the appellee stands in the same position as the insured in reference to the policy of insurance and appellant may assert all defenses against the appellee that it could assert against the insured were he to bring an action on the policy;

and if the defense is not made out that appellee is entitled to judgment.

It goes without question, that regardless of whether or not a rescission by the insurer directed to insured would be a good defense to an action on the policy by the injured person, the rescission and the facts warranting the same must first be proved, otherwise the appellee is entitled to recover *(Pigg v. International Indemnity Co.,* 86 Cal. App. 671).

In view of the general finding of the trial Court for the appellee, we consider that it must follow that upon the evidence the trial Court did not feel that appellant had proved the right to rescind or the rescission.

The answer of the appellant to this statement is to be noted in its brief—where the evidence is recited and the claim made that the testimony is without conflict and shows that appellant had the right to rescind the policy and that the policy was rescinded.

We not only dispute that statement but we earnestly urge that appellant is precluded from having the matter reviewed by this Court; that the review of this Court in the present instance can only extend to an examination of the pleadings and the rulings of the Court during the progress of the trial.

Our contention is based upon the following facts and authorities:

The case was tried and submitted to the District Court for decision without any request from appellant for special findings of fact or special conclusions of law, nor was a request made for a general finding in

favor of defendant. Appellant made a motion for a nonsuit at close of appellee's case and at the close of the testimony both appellee and appellant made a motion for judgment and the cause was submitted (Tr. p. 48); thereafter, the District Court made its general finding in favor of appellee and ordered judgment thereon.

The effect of the failure to request findings and its subsequent limitation of the review that may be had in this Court has been expounded in many cases.

In the case of *Dunsmuir v. Scott* (C. C. A. 9) 217 Fed. 200, 202, this Court stated:

> "Under the provisions of Act March 3, 1865, 13 Stat. 501, Rev. St., Secs. 649, 700 (U. S. Comp. St. 1913, Secs. 1587, 1668), the rule is well settled that if a jury trial is waived, and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, and that the bill of exceptions cannot be used to bring up the oral testimony for review."

The rule is also set forth in the case of *Northern Idaho and Montana Power Company v. A. L. Jordan Lumber Co.*, (C. C. A. 9) 262 Fed. 765, 766.

> "On the trial no exceptions were taken to any ruling of the Court, and no request was made for special findings, or for a finding in favor of the defendant in the action. The plaintiff in error refers to the opinion of the Court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose.
>
> "In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions

presents some erroneous ruling of the Court in the progress of the trial. There being in the present case no ruling of the trial court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this court can go no further than to affirm the judgment."

To the same effect:

Newlands v. Calaveras Min. & Mill. Co., (C. C. A. 9) 28 F. (2nd) 89;

Fleischmann Const. Co. v. United States, 270 U. S. 349; 46 S. Ct. 384, 70 L. Ed. 624;

Oyler v. Cleveland etc. Co., (C. C. A. 6) 16 F. (2nd) 455;

Law v. United States, 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401;

Societe Nouvelle d'Armement v. Barnaby, (C. C. A. 9) 246 Fed. 68.

The appellant has included in the record presented to this Court the opinion of the trial Judge (Tr. p. 14). It has been repeatedly held that such an opinion is no part of the record on appeal; and that such an opinion is not a special finding of facts within the meaning of the statute.

Northern Idaho and Montana Power Co. v. A. L. Jordan Lumber Co. (supra);

Fleischmann Const. Co. v. United States (supra).

The question of the sufficiency of the evidence cannot be reviewed by this Court because appellant failed to preserve its point by appropriate action in the trial Court. Appellant as has been shown, failed to

request any findings; appellant at the close of appellee's evidence did make a motion for a nonsuit which was denied and an exception duly noted (Tr. p. 32) but appellant thereafter continued with its case and introduced evidence in its behalf and did not thereafter challenge appellee's evidence in any manner. Having failed to do this, it has been held the point is lost on appeal.

Alaska Fishermen's Packing Co. v. Chin Quong, (C. C. A. 9) 202 Fed. 707;

Modoc County Bank v. Ringling, (C. C. A. 9) 7 F. (2nd) 535;

American Film Co. v. Reilly, 278 F. 147.

The appellant's motion for judgment at the termination of the taking of the testimony availed it nothing and does not present any question for review.

The case of *Denver Livestock Commission Co. et al. v. Lee, et al.,* 20 F. (2nd) 531, holds that a mere motion for judgment before close of the trial and exception to its denial, is insufficient to save for review the question of sufficiency of the evidence to sustain general finding by court for adverse party. If the question is to be saved, the motion must be specific.

The appellee's view of the rule to be applied in the present situation is most aptly demonstrated by the case of *People's Bank v. International Finance Corporation* (C. C. A. 4), 30 F. (2nd) 46, which states:

> "The first question which arises on this record is the extent of our power to review the decision of the court below. It is well settled that in a law case we have no power to review the evidence or to reverse findings of fact on the ground that

they are not supported by the weight thereof. Where the question is properly raised, we do have the power to pass upon the question as to whether there is any substantial evidence to support the verdict or findings, for this is a question of law; but, for such question to be passed upon here, it must have been raised properly in the court below. As stated, that was not done in this case. The fact that a jury trial was waived does not affect the matter; for in such case, if defendant wishes to challenge generally the sufficiency of the evidence, he should move for a finding in his favor on the ground of its insufficiency, and should note an exception to the refusal of the motion, just as though the trial were had before a jury. Allen v. New York, P. & N. R. Co. (C. C. A. 4th) 15 F. (2nd) 532. If it is thought that certain facts essential to the case of the opposition have not been established by sufficient evidence, it is necessary, not merely to request special findings but to except specifically to any findings objected to. Where the findings are not thus excepted to, and the sufficiency of the evidence to support them is not challenged, in the court below, assignments of error based on the insufficiency of the testimony present nothing for us to review. Fleischmann Const. Co. v. U. S. 270 U. S. 349, 46 S. Ct. 284, 70 L. Ed. 624; Gillespie v. Hongkong & Shanghai Banking Corporation (C. C. A. 9th) 23 F. (2nd) 670; Lahman v. Burnes Nat. Bank (C. C. A. 8th) 20 F. (2nd) 897; Humphreys v. Third Nat. Bank (C. C. A. 6th) 75 F. 852.

The rule stated by Judge Taft in the case last cited and quoted with approval in the Fleischmann case, supra, is as follows:

'He should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the

facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits.'

Although we cannot, in the absence of proper exceptions, review the sufficiency of the evidence to sustain the findings, we can, where the judge makes special findings, review the sufficiency of the findings to sustain the judgment. R. S. Sec. 700; 28 U. S. C. A. Sec. 875."

II.

THE RESCISSION IS INEFFECTIVE AS TO THE APPELLEE.

We will discuss this part of the case on the assumption that the facts are as the appellee represents them to be, namely, that Dr. Jarvis had issued to him a policy of insurance by the appellant. That he thereafter negligently performed an operation on appellee. That after this negligent operation, but before the appellee sued Dr. Jarvis, or the appellant, the appellant rescinded the contract of insurance, (although we must state that whether the rescission was made before suit was commenced against Dr. Jarvis, is not definitely established). That thereafter, appellee recovered her judgment against Dr. Jarvis and then commenced this suit against appellant.

On the foregoing statement of facts, we claim that under the California statute (Stats. 1919, p. 776), this contract of insurance is a tri-party contract. That the rights of the appellee under said policy of insurance accrued at the time of the injury (November, 1925), and that the rights of the company to the insured

person, cannot be affected by any subsequent action taken as between the insurer and the insured.

Every policy of indemnity insurance written in the State of California, since the passage of the statute (Stats. 1919, p. 776), is a tri-party contract.

> *Malmgren v. The Southwestern Accident Insurance Co.*, 201 Cal. 29, 33, 34,

wherein it is stated:

> "* * * The provisions of the statutes, are, as a proposition of law, a part of every policy of indemnity issued by a company or corporation engaged in transacting the kind of indemnity insurance business which appellant was authorized by the law of the state to transact. It was a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy. * * *
>
> * * * The statute is founded upon principles of public policy and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a tri-party contract. * * *"

See:

> *Pigg v. International Indemnity Company, supra.*

The appellee in her action against appellant was proceeding on a contract right (cases heretofore cited).

The rights of the injured person under said policy accrue at the time of the accident or injury and the liability of the company to said injured person cannot

be affected by any subsequent action taken as between the insurer and the insured.

Malmgren v. The Southwestern Accident Insurance Co., 201 Cal. 29 (supra);

Finkelberg v. Continental Cas. Co., 126 Wash. 543; 219 Pac. 12;

Slavens v. Standard Accident Ins. Co., (C. C. A. 9) 27 F. (2d) 859;

Metropolitan Casualty Ins. Co. v. Albritton, 214 Ky. 16, 282 S. W. 187.

In the *Finkelberg* case (cited with approval in *Stusser v. Mutual Union Insurance Co.* (1923) 127 Wash. 449, 221 Pac. 331, and *Slavens v. Standard Accident Ins. Co.* supra) it is stated:

> "We are satisfied that the appellant (the injured person) has a right to maintain this action against the respondent, (insurance company) * * * and that this right accrued at the time of the accident."

In view of the authorities we have cited and the familiar rule that a third person, beneficially interested in a contract may maintain an action to recover thereon, even though the identity of the third person may not be known at the time of the execution of the contract; the rescission in this case was ineffective for any purpose and the defendant is bound by its contract with the plaintiff.

III.

APPELLEE'S RIGHT TO JUDGMENT AGAINST APPELLANT IS ABSOLUTE.

The appellee is proceeding in this action upon the contract right conferred upon her by statute, and under said statute it is our contention that the appellant is not entitled to raise this defense; that this statute in the interests of public policy vitiates any such defense on the part of the insurer.

Let us first look to the reasons for this enactment of this statute and the intent of the legislature that lies behind it. It is a matter of common knowledge that for many years prior to the enactment of this statute it was the policy of certain unscrupulous insurance companies whose insured had judgments recovered against them for injuries to supply said persons with an attorney; put them through bankruptcy and give them a sum of money in order to avoid responding to these judgments. It was one of the tricks of the business, however, an aroused public demanded relief from such tactics and the present statute was enacted to curb any such activity on the part of any insurance company.

We say that this statute deprives the insurance company of the defense it is attempting to set up; not only in express terms but also by virtue of the intent that is behind it, for of what practical benefit would this statute be if the insured and the insurer could get together and cancel or rescind the policy and thereby leave the injured person without any recourse; such cannot be nor is it the effect of the statute for

the insured and the insurer would be doing the very thing the statute strikes at.

The opinion of the Supreme Court of the State of California in regard to this statute, as expressed in the case of *Malmgren v. Southwestern Accident Insurance Co.,* 201 Cal. 29, at pages 33 and 34, is most apt:

> "The substantive law of this state cannot be enlarged, circumvented, defeated, or modified by any provision which the insurer may have elected to place in its contract in derogation of or in conflict therewith. The statute is founded upon principles of public policy and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a tri-party contract. If appellant's contention be sound, then it could, with equal justification, require the question of the assured's bankruptcy to be adjudicated by a competent tribunal before it would be obliged to recognize his insolvency or bankruptcy, or impose other conditions precedent to the injured person's right of action in derogation of express provisions of the law's mandate. We see no merit in the contention. Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796 (197 N. Y. Supp. 606), relied upon as an authority in the instant case, is merely declaratory of the New York statute, which provides that a cause of action does not accrue to the injured person until an execution issued upon the judgment against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. No such language or language equivalent thereto is found in the statute of this state and neither appellant nor this court is given authority to interpolate the provision of the New York law into a California statute. The clause in the statute which provides that an 'action may be brought

> against the company, on the policy and subject to its terms and limitations, by such injured person' was not intended to defeat its purpose upon the theory that an action brought 'on the policy' binds the injured person to a repudiation or waiver of the benefits of the statute expressly adopted for his protection, but it clearly has reference to those matters concerning which the insurer and assured could legally contract."

The recent case of *Kruger v. California Highway Indemnity Exchange,* 201 Cal. 672, contains a great deal of reasoning and thought that applies to the situation before us. The Court, in that case, deals with a jitney bus ordinance of the City and County of San Francisco. The opinion establishes that there can be no question of the constitutionality of such statutes (pp. 177 and 178).

Now, this ordinance is the enactment of the local legislator in response to the public demand for protection in its special phase even as Statutes 1919, page 776, is the enactment of the state legislators to govern a larger class of the same sort of cases.

The reasoning and interpretation given the ordinance applies as well to the state statute. The points we urge here in relation to the state statute and which were decided and held to be the proper construction and interpretation of the local ordinance, are matters of first impression in so far as the state statute is concerned.

The statute provides:

> "No policy of insurance against loss or damage resulting from accident to, or injury suffered by

> another person and for which the person injured is liable * * * shall be issued or delivered to any person in this State by any domestic or foreign insurance company, authorized to do business in this State, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that *in case judgment shall be secured against the insured* in an action brought by the injured party or his etc., then an *action may be brought against the company on the policy and subject to its terms and limitations, by such injured persons etc., to recover on said judgment.*"

In order that we may be clear upon this construction of the statute we will state that the clause "and subject to its terms and limitations" can only be taken in one way, namely: that the recovery thereon is to be limited to the figures that the policy provides and that the insurance cover the risk in question, for example, a judgment of $10,000 and a policy of insurance for $5,000, the recovery is limited to the $5,000, but given a judgment and a policy of insurance, indemnifying against the liability on which the judgment is recovered, and there is nothing to stop the judgment holder's right to recovery, but the provisions of the statute which require insolvency or bankruptcy on the part of the insured.

We have shown in this brief under our discussion of the rescission phase that under this statute and the policies of insurance written thereunder that the liability of the insurer to the injured person becomes

fixed at the time of the injury. The liability is fixed even though suit to enforce that liability cannot be commenced until after judgment against the insured and his insolvency or bankruptcy. The insurer by writing insurance under this statute, undertakes to pay such judgment in case these conditions occur and the suit is brought, as the statute states, *to recover on said judgment.*

We cannot see any distinction between the liability assumed by the insurer in the *Kruger* case, from that assumed under the state statute by the insurer in this case.

We must give the statute a construction that makes it virile and effective, not one that emaciates it and makes it a dead letter and subject to the machinations of unscrupulous parties.

The appellant contends, of course, that this statute under which appellee proceeds, saves to the insurer all defenses that it could urge against the insured.

As we have shown, there is no definite expression on this question by the California Courts.

We do not agree with appellant in what may be deduced from the case of *Bryson v. International Indemnity Co.*, 55 C. A. D. 87; the only question decided there was that unless the policy covers the risk, the insurer cannot be held by an injured person, and the insurer may show that it had not assumed liability in certain situations. That is an entirely different proposition from a suit by an injured person against an insurer on a policy which covered the insured under those circumstances in which the person was injured.

It is not our contention that merely because a person is insured, his insurer must answer for all his misdeeds. The injured person must show he was one of the class the policy included.

And of course, in the *Pigg v. International Indemnity Co.* case (supra) the Court did not have to consider the question at all inasmuch as the evidence did not establish the proposition the insurer was urging as a defense.

We are convinced that in view of the *Malmgren* case and the reasoning therein, when coupled with the *Finkelberg* case, which carries that reasoning to its logical conclusion that there can be no doubt as to the course California will adopt when the question is squarely presented to its Courts.

CONCLUSION.

We have considered this case in the light of appellant's claims, from which it follows, that the appellee is entitled to recover unless the appellant proved that it was entitled to rescind the policy and that it did rescind the policy before any action was commenced thereon.

We have directed this Court's attention to the fact that this matter is before it upon a general finding for appellee and have contended that it necessarily follows that the trial Court must have found against the establishment of the facts of this defense and that even though appellant claims this is contrary to and against the weight of the evidence, still appellant by

failing to take appropriate action in the trial Court cannot bring the testimony to this Court for review.

We submit that the review of this Court is limited by the condition of the record, to an examination of the pleadings and the rulings of the trial Court on the admission and exclusion of evidence and that in view of the fact that the *prima facie* case of appellee has, in so far as this Court is concerned, remained undisturbed, the judgment of the District Court should be affirmed.

Though to our mind, in no way required, we have discussed the case upon its merits and in the light most favorable to appellant, and we consider that this Court agrees with the conclusions heretofore arrived at by other Appellate Courts that the subsequent actions between the insurer and the insured in regard to a policy of insurance cannot affect the rights of third parties theretofore accrued therein.

We submit that the California statute is to be given an interpretation in accord with the purposes sought to be accomplished thereby and that the judgment of the District Court be affirmed.

Dated, San Francisco,
June 17, 1929.

Respectfully submitted,
HARRY I. STAFFORD,
DEAN CUNHA,
Attorneys for Appellee.

DANIEL R. SHOEMAKER,
Of Counsel.

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No. 5708

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGIA CASUALTY COMPANY (a corporation),
Appellant,

vs.

LAURETT BOYD,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully asks a rehearing in this cause for the reason that appellee sincerely believes that this Court, in its judgment has failed to apply certain fundamental legal principles and as a result thereof, has rendered a decision, which if not corrected, will result in the gravest injustice.

Appellee is inclined to believe that this Court understood the exact situation as it existed between the doctor, the insurance company and herself, yet, certain passages in the decision of the Court raise a doubt in appellee's mind.

There is no doubt that Dr. Jarvis had the policy of insurance issued to him in May, 1925, containing that certain provision required in such contract by virtue of Statutes 1919, page 776; that said policy was issued to the doctor only upon certain warranties or representations. That thereafter, while this policy was in the possession of the doctor, the premium in the hands of the insurance company, and from all that appears while each of said parties held the same in full force and effect, the doctor operates on appellee and injures her. Now appellee gets after the doctor; the insurance company does a little investigating and soon the doctor receives a notice of rescission, advising him that the company has discovered the falsity of one of his warranties or representations, and on that ground it was rescinding the policy and returning the premium. That which we would especially point out is that no notice of this rescission is sent to appellee. She is completely ignored as well as ignorant of the rescission. Then, as we know, appellee sued and recovered a judgment against the doctor and he chose to become a bankrupt; the appellee then demanded that the insurance company pay the judgment obtained against its insured and was told that they denied all liability and the foregoing rescission was explained as the ground, even as it was later the defense in the cause which was brought under the provisions of the statute and which is now before this Court on appeal.

The basis of this decision, as we view it, is contained in the statement by the Court that:

> "The evidence is without conflict and fully supports the appellant's affirmative defense" (Opinion, p. 3, line 4).

We cannot agree to this statement in view of the fact that there is found in this case certain testimony that raises the question of notice and waiver by the insurance company. Dr. Jarvis, while testifying on behalf of the insurance company said that while he was insured with the Georgia Casualty Company, their agent recommended that he settle the claim, now being used as a defense and that said agent stated that it was no claim against the doctor, anyway, in the sense that it was caused by any negligent conduct on his part. Of course, this is denied by Mr. Williams, who was also called as a witness by the insurance company, and who claims that he at no time represented the Georgia Casualty Company (Tran. pp. 44 and 45). This is clearly a conflict of evidence on the appellant's side of the case and we most earnestly urge, that inasmuch as there were no findings of fact other than those which may be implied by reason of the judgment for appellee this Court is exceeding its province when it chooses to adopt certain evidence and ignore other testimony equally as credible. We, again, say to this Court that without the findings of the trial Court, especially in this case, the motion for judgment raised no question which this Court could review, and that the Court erred when it departed from the rule, that every intendment in favor of the validity of the judgment of the trial Court is to be exercised by the Appellate Court. Further, since there are no findings of fact, we do not feel the Court

has acted within its jurisdiction when it undertakes to say what the trial Court did or did not believe from the evidence as adduced before it.

Whether or not the insurance company had the right to rescind as against Dr. Jarvis, the appellee is not concerned. The appellee claims that under the policy of insurance she had certain contract rights, that were valid and enforceable and that if there were any defense to her action, the proper steps were not taken by the insurance company to preserve it.

In its discussion of appellee's rights under the policy of insurance, the Court has refused to consider appellee's authorities on the ground they were not in point and has failed to apply those rules applicable to contracts which are voidable as distinguished from those which are void.

Regardless of what else the case of *Malmgren v. S. W. etc. Insurance Company,* 201 Cal. 29, may decide, it does declare that insurance policies, which by virtue of the California Statute must incorporate its provisions, are tri-party contracts, consisting of the insured, the insurer, and the prospective injured party. That holding is no mere dictum and is binding upon this Court in applying the statute. Further, appellee referred to said case only for its authority upon that point.

Contrary to the opinion of the Court, we believe that the contract of insurance between the doctor and the insurance company was a valid contract of insurance; and that it was not void. It was the usual policy written in such cases, subject to the one in-

firmity, if we assume the truth of the insurance company's defense, that it was induced to enter into the contract by reason of the doctor's fraud. This most certainly did not invalidate the contract, it did make the contract *voidable*, as distinguished from void, and until such time as the insurance company acted upon its rights, it was a perfectly valid and subsisting contract (6 Cal. Jur. 28, par. 12). Meantime, between the making of the contract and before the rescission, appellee had been injured and her rights under the contract had accrued. She was an innocent party, untouched by the doctor's fraud and it cannot be raised against her.

The rule as to voidable contracts when the rights of innocent third parties intervene is to prevent the rescission and leave the original parties to the contract subject to the remedy of damages as between themselves.

There is an expression in the opinion that appellee furnished no consideration, and our reaction is that this prejudiced the cause of appellee. Of course, this should not be so, for the rule in this jurisdiction, as in the majority of jurisdictions is:

> " * * * that a third person may enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. In other words, it is not necessary that any consideration move from the third party; it is enough if there is a sufficient consideration between the parties who make the agreement for the benefit of the third party. This doctrine, originally an exception to the rule that no claim can be sued upon contractually unless it is a contract between the parties to the suit, has become

> so general and far reaching in its consequences as to have ceased to be simply an exception, but is recognized, within certain limitations, as an affirmative rule."
>
> 6 *R. C. L.* 884;
>
> *Buckley v. Gray,* 110 Cal. 339, 42 Pac. 900.

If what we have said is true, then we feel that appellee comes within that portion of the opinion that reads as follows:

> "It may be conceded that after an injury has been suffered, neither by agreement nor otherwise, could the parties to the policy deprive the injured person of the benefit thereof, but as already suggested, the right of the third person presupposes the existence of a *valid* policy." (Page 5, lines 9-13.)

In referring to appellee's authorities, the opinion of this Court states

> "But admittedly, no decided case is directly in point, and hence, we do not stop to analyze or distinguish the citations."

True, there is no case cited on all fours with the present case, however, each of said cases presents a similar situation and we feel that the reasoning therein, carried to its logical conclusion, is that which should be applied to this cause.

It is our belief that the principles and rules gleaned from a study of those cases, create a mathematical reasoning from which the appellee's right to recover is inescapable.

We submit that the conclusion of this Court, if not rectified, will vitiate the very purposes of the California statute. The primary and only object of this

statute is the protection of the injured party. Its purpose is to prevent and remedy certain evils that once prevailed in the insurance business. If the injured person is to be denied a recovery on the state of facts we have here what is to prevent practices along this line? A very simple method is presented the unscrupulous by which the statute may be evaded under the restricted effect given it by this decision.

Dated, San Francisco,
August 28, 1929.

Respectfully submitted,

HARRY I. STAFFORD,
DEAN CUNHA,
Attorneys for Appellee and Petitioner.

DANIEL R. SHOEMAKER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 28, 1929.

HARRY I. STAFFORD,
Of Counsel for Appellee and Petitioner.